Lecture I
General Theory of Legal Proof

Power

It is not possible to understand legal proof without bearing in mind that law is *essentially conservative*. Because law limits the exercise of *naked* power, it is often a source of hope and strength to the poor and powerless. Indeed, in some situations law may be the only hope and strength the poor and powerless have. But all law, everywhere, is created by the rich and/or powerful to preserve their wealth and/or power. Law is not socially progressive. Its *raison d'être* and basic stance is to resist changes in the legal *status quo*: not to *prohibit* them, but to *resist* them. The requirement of legal proof is an aspect of this resistance. If certain facts have been legally proven, a court may legally order a change in the legal *status quo*. If those facts have not been legally proven, a court may not legally order a change in the legal *status quo*.

Notice that in saying law is conservative, I am leaving statutes out of law. The major function of statutes is precisely to *change* the legal *status quo*.[1] But statutes are

[1] Their other function is to codify the *status quo*. Some statutes are vague as to which function they are serving. Some proclaim their function. The same is true for constitutions, which as far as I can see, are simply a higher order of statute.

Law is made by those with wealth and/or power to preserve their wealth and/or power.

Law is essentially conservative; it resists changes in the legal status quo.

"laws", not "law". Statutes, like revolutions, reflect changes in legal power. The laws, the law and law are related ideas. Both "the laws" (which are the statutes) and "the law" (which Austin defined as the command of an uncommanded commander issued to people habituated to obey and backed by force[2]) are aspects of power. "Law" as it is related to legal proof is a matter of reason. It transcends revolution. After a revolution, the laws and the law are changed, but law is not and neither is legal proof. Different things will have to be proven to different people, but if there is law after a revolution (and there usually is) it will require proof for the same reason that proof was required before the revolution. The reason is that law is essentially conservative.

. The difference after a revolution is *who* is in power, not *what* those in power seek to do with law. When those newly come to power have solidified their authority, they will use law to preserve the new legal *status quo* in the same way as the authorities who were ousted used it to preserve the old legal *status quo*. After a statute is passed changing the law, law defends the new legal *status quo*, just as it would after a revolution.

Reason

Law is the exercise of power subject to reason. Mr. Justice Jackson, the American prosecutor, opened the Nuremberg Trials with these words:

> That four great nations, flushed with victory and stung with injury, stay the hands of vengeance and voluntarily submit their captive enemies to the judgment of the law, is one of the most significant tributes that Power ever has paid to Reason.[3]

If one needs proof that the Nuremberg Trials were more than an exercise of power, one can look to the fact that some of the Nazis tried at Nuremberg were acquitted and that those who were convicted were sentenced to various punishments. Some were executed; some were sentenced to prison terms. The terms varied from ten years to life. It is hard to see these distinctions as anything but an exercise in reason.

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[2] J. Austin, **The Province of Jurisprudence Determined** (1832, reissued Weidenfeld and Nicholson, London, 1954).

[3] **Trial of the Major War Criminals Before the International Military Tribunal**, 21 Nov. 1945, Vol. II, Proceedings, p. 99 (Nuremberg, 1947).

A law, the laws and the law may change. Law remains the same; it is the exercise of power constrained by reason; it is a way of thinking about things.

Law constrains those with power to make distinctions they might not otherwise make. In law, to act with "reason" means being able to give reasons for any exercise of power. By "reasons" we mean justifications, not motivations.[4] Law is usually not interested in *why* something was done, but in whether a defence can be offered for doing it. To say law is the exercise of power constrained by the exercise of reason is to say law is the requirement that there be a legally acceptable justification for the exercise of power. If there is no legally acceptable justification for the exercise of power, the power was not exercised "legally".

The study of a nation's laws is the study of the legally acceptable justifications for the exercise of power. The law varies from jurisdiction to jurisdiction, but legal proof is always part of it. In *every* "legal" jurisdiction, legal proof is an acceptable legal justification for the exercise of legal power. If certain facts have been legally proven a court may legally make an order changing the legal *status quo*. If those facts have not been legally proven the legal *status quo* may not be legally changed.

Legal systems may differ about what constitutes legal proof, but in every legal system, everywhere, a person who has been put to death without legal proof that he or she committed a crime the legal rules of that jurisdiction make punishable by death, has not been "legally" executed. He or she has simply been killed. The unanimity of all legal systems on this question is striking and there is no better illustration of it than the events that occurred after the recent terrorist attacks on the World Trade Center and the Pentagon. A few days after the September 11, 2001 attack, U.S. President George W. Bush gave a speech before a joint session of the American Congress in which he demanded that the Taliban government of Afghanistan turn Osama bin Laden, a person residing in Afghanistan, over to the United States. The next day, the Taliban government refused to turn bin Laden over unless Bush *proved* bin Laden had been involved in the attacks. Bush, of course, had already announced that he had such proof.

The law of a poor, revolutionary country ruled by Islamic fundamentalists is very different from the law of a rich, secular super-power, but law is the same in both places. The facts the U.S. would have had to prove, the standard to which it would have had to prove them, the facts bin Laden would have been allowed to prove in defence and the

[4] Motivation is sometimes more important than justification. Even if there were a legal justification for it, a judge's decision in a case in which he or she had a financial interest would not be legal. The suspicion of an improper motive can sometimes override the existence of an otherwise acceptable justification. Motivation can sometimes undercut justification in law, but usually not. That motivation does not normally count in law makes legal argument tendentious. The reason one actually has for an exercise of power need not be the reason one gives to justify it legally.

Law is the requirement that there be a legally acceptable reason (justification, not motivation) for the exercise of power.

Legal proof is a justification for the exercise of legal power.

forum in which it would have been decided whether the burden of proof had been met were all questions about which the two governments would have disagreed fundamentally, but they agreed that without legal proof, a change in bin Laden's legal status was not legal.[5]

Before there can be a legal change in the legal *status quo*, a burden of proof must be met. This is true for criminal guilt and also for civil liability. In a civil trial, if certain facts are legally proven, a court may order one party to turn over property to another – to pay damages, for instance. An order for damages changes the legal status of the parties. The defendant becomes a judgement debtor; the plaintiff, a judgement creditor. In appropriate cases, the court may simply declare that certain property, which had the legal status of belonging to one party, now belongs to the other. The status of the property has been changed.[6]

Burden of Proof

A jurisdiction in which legal proof was not required would not have law. The requirement of legal proof is the *burden* of proof. That we use a physical term like "burden" in this central legal metaphor is instructive. The legal idea of a burden of proof is related to the physical idea of inertia. In the natural world, objects in motion remain in motion and objects at rest remain at rest unless force is applied to stop, divert or move them. In law, the legal status of someone or something will not be changed unless 'force' is applied to change it. The 'force' needed to change the legal *status quo* is meeting the burden of proof.

The idea of a burden of proof has been articulated more elaborately in the judicial setting than anywhere else and hence, it is conventional to talk about legal proof in terms of courts. Everything I have said so far about proof and the burden of proof applies to other legal forums,[7] but courts are conceptually essential to law in a way no other legal institution is. When we apply the adjective "legal" to something, we are always talking, at least implicitly, about what a judge would say if there were a trial. We cannot and do

[5] Indeed, without proof, punishment is not "punishment"; it is simply the application of force.

[6] The difference between the two is, I believe, the difference between an *in personam* and an *in rem* order.

[7] The administrative agencies of a government under law should not grant licenses or permits unless the applicants "prove" entitlement. A legislature should not change the law unless it is "proven" that a change is necessary.

The requirement of proof is the burden of proof.

When a burden of proof has been met, it is legally OK to change the legal status quo.

not use the word "legal", except against the background of a hypothetical proceeding in a court.

A legislature is not essential in the same way. If you say: "I have a legal right", you do not necessarily mean you have a right embodied in a statute, but you do necessarily mean you have a right that would be recognized in a court, *if* you went to court to have the right recognized. You need not be, and of course, you usually would not actually be planning to go to court to have the right recognized. We often use the word "legal" without *actively* thinking about a court. But we never use the word "legal", indeed, we *cannot* use the word "legal", without passively or implicitly thinking about a court.[8]

A "legal" document, for instance, whether it is a statute, a by-law, a contract or a permit, must envision the *possibility* that it might be used in a trial. This is what it means for a document to be "legal" and it is why lawyers are employed to draft legal documents. The parties to a contract could write down their own understanding of their agreement in a way which would serve perfectly well as long as they continued to agree. Lawyers are employed to draft contracts *in case the parties cease to agree*. The lawyer's job is to think what legal consequences the contract would have, that is, how a judge would interpret it, *if* it wound up in court. In 1992, Canada conducted a referendum on a proposed Constitutional document, which contained certain provisions that were specifically said to be "non-justiciable" for five years.[9] The referendum was defeated, so the document did not become part of the law, but if this document had become part of the law, these provisions could not have been enforced in a court. As long as these provisions were non-justiciable, they would have had no *legal* effect. Indeed, I think that was the purpose of making them non-justiciable: to assure that they would not have any *legal* effect.

Notice that in saying the non-justiciable provisions would have had no legal effect, I am not saying they would had *no* effect. Law is not the only thing that makes us

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[8] Talking about law in terms of courts may only be conventional in Common Law. One way for a Common Law lawyer to get a feel for Civil Law would be to understand that Civilians might find it impossible to think about law without thinking about what was in the Code.

[9] Charlottetown Accord, August 28, 1992, s. 42:

> The inherent right of self-government should be entrenched in the Constitution. However, its justiciability should be delayed for a five-year period ...

Draft Legal Text, October 9, 1992, s. 35.3:

> ... section 35.1 shall not be made the subject of judicial notice, interpretation or enforcement for five years after that section comes into force.

One cannot think about law without at least implicitly thinking in terms of a trial in a court.

act in certain ways. Our actions are also affected by our sense of what is right and wrong. Despite the fact that they were not legally binding, the government may well have felt it was right, indeed, it may even have felt it was obliged to abide by the non-justiciable provisions. My point is that, if the sections were non-justiciable, they would not have had any *legal* effect and any obligation the government felt would not have been a *legal* one[10].

A thing is what it does.[11] In court, meeting a burden of proof warrants a change in the legal *status quo*.[12] That certain facts have been legally proven provides a legally acceptable justification for making a change in the legal *status quo*. Legislation and legal argument are other acceptable forces capable of changing the legal *status quo*. Legislation and legal argument can change the law. Legislation can change the rules; legal argument, if it is accepted, can change what the rules mean or how they apply in general. Legal proof does not change the law. It warrants a change in the legal status of particular persons and things. The Nazis who were convicted at Nuremberg could be legally executed or sent to jail because certain facts had been legally proven. The acquittal of some of the Nazis tried at Nuremberg means precisely that the burden of proof was not met.

Benefit of the Doubt

Every legal decision is made using a technique described in the cognate terms: burden of proof and benefit of the doubt. On every fact in issue, we say one party has the burden of proof, the other, the benefit of the doubt. The parties, however, are just stand-ins for the legal *status quo*. The benefit of the doubt *always* belongs to the legal *status quo*: it will not be changed unless the burden of proof is borne. We do not usually speak of the *status quo* as having the benefit of the doubt. But the relationship between the legal *status quo* and the benefit of the doubt is analytical. The definition of the legal *status quo* is that which has the benefit of the doubt,

This is clearest at the start of a trial. In every legal trial, civil or criminal, the defendant, the party that resists a change in the legal *status quo*, has the benefit of the

[10] If the government had acted in accordance with the non-justiciable provisions, they would have been *effective*, without being *legally* effective. It is an ironic paradox that law is most effective when it does not need to be legally effective.

[11] F.S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 Col. L.R. 809, 826 (1935).

[12] The extent to which length of sentence and quantum of damages depends on legal proof is not clear. In legal theory it is not clear whether or not one is supposed to think of length of sentence and quantum of damages in terms of little bits, each one of which must be warranted by proof of the appropriate facts.

In a court, the legal status quo, the way things are, always starts with the benefit of the doubt.

doubt to begin with. A proceeding in which this is not true, a security hearing or a lynch mob, is not a "legal" proceeding, regardless of its form. The burden of proof always begins on the party initiating the proceeding, the plaintiff in a civil case, the prosecution in a criminal one. This party has the burden because it seeks an order of the court changing the legal *status quo*.

If during the course of the trial, the burden of proof moves to the defendant, this is a sign that the legal *status quo* has changed.[13] Whenever the burden of proof moves, the *de facto status quo* has changed. This fact is usually not announced, but if a burden of proof is not met, the party without it wins. When the burden of proof is on the defendant, the benefit of the doubt has moved to the plaintiff or prosecution. If the defendant fails to prove what it now has the burden of proving, the plaintiff or prosecution is legally *entitled* to the order it sought at the beginning of the trial. When the defendant has the burden of proof, the defendant has the burden of taking away what the plaintiff or the prosecution became entitled to when it met the burden of proof. Movement of the burden of proof in a trial always indicates a change in the legal *status quo*.

Burden of proof and benefit of the doubt are opposite sides of the same coin. A physical metaphor that can assist us in understanding burden of proof is a chinese-checker board. When a trial begins, the marbles are set in certain holes: some facts have the benefit of the doubt. This is the legal *status quo*. If you walk away from the board, when you come back, if there has not been a major catastrophe, you will find the marbles right where they were.[14] If the marbles just rolled around, you wouldn't have law.[15]

The legal *status quo* must be relatively stable, but it must not be fixed and immutable either. Law is a compromise between fixity and flexibility. It does not make the legal *status quo* immutable. It merely requires that there be a legal justification for any change. The marbles must not be so light that they move on their own, but they must be movable. Meeting the burden of proof is the 'force' required to overcome law's inertia; benefit of the doubt is stability that can be overcome.

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[13] The ways in which this happens are discussed in Lecture II.

[14] When a game is needed as an analogy for law, chess is usually chosen. I am not using chinese checkers as a *game*, just the marbles and holes as a *physical* metaphor for proof. What I say about the stability of the marbles in the holes is true for a chess board as well. Chess pieces do not move around on their own either, but metaphorically, if not scientifically, gravity alone seems less stable than gravity plus concavity.

[15] *Sin onere nulle leges.*

In a trial, if the burden of proof moves, that indicates a change in the legal status quo.

Law is a compromise between fixity and flexibility.

We sometimes talk about law being neutral, but law is not neutral and it is not supposed to be neutral. Law is supposed to be for some things and against others. The assignment of the burden of proof and the benefit of the doubt is the way society's point of view – its attitude toward things – is embodied in the law. If someone wants to start a new industrial process and someone else says the process will pollute the environment, the law determines who gets the benefit of the doubt and who gets the burden of proof. The law could say those who are for the process have to prove it will not pollute or it could say those who are against the process have to prove it will. The way the law assigns the burden of proof and the benefit of the doubt determines how much pollution and how much development there will be.

Lawyers, judges and legal scholars often miss this point. They sometimes say burden of proof only counts in the few cases where proof is exactly tied. Professor James, for instance, says we have burdens of proof because

> there is the possibility that the decider, or trier of the fact, may at the end of his deliberations be in doubt on the question submitted to him. On all the material before him, he may for example regard the existence or non-existence of the fact as equally likely -- a matter in equipoise.[16]

This same view was expressed by the Privy Council in *Robbins* v. *National Trust Co.*
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> [O]nus as a determining factor of the whole case can only arise if the tribunal finds the evidence pro and con so evenly balanced that it can come to no sure conclusion. Then the onus will determine the matter. But if the tribunal, after hearing and weighing the evidence, comes to a determinate conclusion, the onus has nothing to do with it, and need not be further considered.[17]

Burdens of proof *do* serve the function of resolving equipoise, but that is not *all* they do. Burdens of proof determine the *slant* of the law, the overall trend or pattern of

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[16] F. James, *Burdens of Proof*, 47 Va. L.R. 51 (1961).

[17] [1927] A.C. 515, 520 (P.C.).

The law is not neutral and is not supposed to be neutral; it is supposed to be for some things and against others.

A society's attitudes toward things are embodied in its law's burdens of proof. Burdens of proof are the slant of the law: they determine the overall pattern of legal decisions, which determines the pattern of litigation and settlement.

legal decisions. Burdens of proof do not just work in close cases; they decide which cases will be close. In British Columbia, on the breakdown of a marriage, section 56 of the *Family Relations Act*[18] gives each spouse a one-half interest in property owned by the other and "ordinarily used for a family purpose". Section 60 says that

> the onus is on the spouse opposing a claim under section 56 to prove that the property in question is not ordinarily used for a family purpose.

It is usually wives who seek division of separately owned assets, so the burden of proof in section 60 makes the *Family Relations Act* "wife-friendly".

In particular cases s. 60 may or may not matter. If it can be proven that a particular piece of property was ordinarily used for a family purpose s. 60 is irrelevant. Similarly, if it can be proven that a particular piece of property was not ordinarily used for a family purpose. The only time s. 60 comes into play in a particular case is when it cannot be proven whether or not the piece of property in dispute was or was not ordinarily used for a family purpose. But look at what s. 60 does to the *overall* application of the *Family Relations Act*. Think how differently the A*ct* would work if the burden of proof went the *other* way.

With the benefit of the doubt the way it is, more separately owned assets get divided than would get divided if the benefit of the doubt went the other way. Each decision may not be determined by the benefit of the doubt, but the *pattern* of decision is. More important, the pattern of *litigation and settlement* under the *Act* is different from what it would be if the benefit of the doubt went the other way. If the burden of proof were against them, spouses without assets would not seek division of assets as frequently as they now do, and if the benefit of the doubt was for them, spouses with separately owned assets would be more likely to resist division than they are now.

Proof

A fact that cannot be proven is not a legal fact. Oliver Wendell Holmes said lawyers must learn the law from "a bad man's point of view",[19] and it is useful to imagine how an unscrupulous person might act when making an agreement. He would look cautiously over his shoulder to make sure no one was within earshot, and then he would say, "Alright, I agree, but I'm not going to sign anything". If an agreement is not signed

[18] R.S.B.C. 1996, c. 128. Throughout the book, I use the Statutes of British Columbia as examples. Every jurisdiction will have analogous examples.

[19] *The Path of the Law*, 10 Harv. L.R. 457, 459 (1897).

A fact that cannot be legally proven is not a legal fact: if something cannot be proven in court, legally it never happened.

or acknowledged in front of witnesses, it is virtually impossible to prove in a court of law and if something cannot be proven in a court of law, it is as if it never happened.

So proof is central in law, but it is also central outside law; indeed, proof could be said to be as central in science, history, mathematics and logic as it is in law. There used to be Proofs of God. We do not see many of those anymore. In the second half of the seventeenth century a small group of Englishmen reshaped the idea of proof in science, history, theology and law.[20] Following the ideas of Sir Francis Bacon, a Lord Chancellor who was also a philosopher and an amateur scientist, the English Royal Society began the project of collecting all the "facts" in the world. These included the new scientific facts of physics, chemistry and biology, and the new facts about people, plants and animals in parts of the world that were just being explored. One sort of fact might be established by experiment, another by the report of an explorer who had seen it.

Thoughtful men from many disciplines realized there were different standards for what counted as proof and they carried on an elaborate theoretical discussion about what *standard* of proof a fact had to meet in order to qualify for inclusion in the collection. The virtuosi who participated in this discussion did not limit themselves to proof in one area or another. They saw themselves as asking one question that arose in a great many different areas: What counts as proof of a fact?[21] The experience of the seventeenth century teaches us that it would be wrong to pull legal proof away from the other forms of proof and one very useful way to understand legal proof is to compare it with the other kinds of proof.

Scientific and historical proofs are similar to each other in that both are proofs of *facts* and warrant the statement "I know such and so." Historical proof warrants a claim to knowledge about the past; scientific proof warrants claims to knowledge about both the future and the past. Historical and scientific proof also contain an assertion that "You must agree that such and such is so."[22] In other words, both warrant the statement, "*We* know." We know that John A. Macdonald was born in 1815. We know that combustion consumes oxygen. It always has and always will.[23]

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[20] B. Shapiro, **Certainty and Probability in Seventeenth Century England** (Princeton, 1983).

[21] For more on this, see Lecture II, p. 23-5.

[22] Shapiro refers to this as "compelled assent", supra, n. 20, at p. 6. It was Alan Hunt who first made this point to me.

[23] Scientists used to say the blood went back and forth in the body. It does not. That is embarassing for science. We used to think the peoples who were in North America when the Europeans arrived had come across the Bering Strait. I understand we are no longer sure that is true. Changes like this are embarrassing for history. The fact that history and science are sometimes wrong does not abrogate the warrant they provide to say, "We know". As I said in the introduction, I do not agree with P.K. Unger that "no one knows anything about anything". **Ignorance: the case for scepticism**, (Clarendon Press, 1975).

Legal proof is about consequences, not knowledge.

A party that meets its burdens of proof is legally entitled to a change in the legal status quo: meeting a burden of proof compels a change in the legal status quo.

As in science and history, so in law: what are proven are *facts*, but legal proof is not a warrant to say, "I know" or even "we know". Legal proof is not about *knowledge*; it is about *consequences*. Legal proof is a warrant to change the legal *status quo*; indeed, legal proof virtually *compels* a change in the legal *status quo*. In this regard, legal proof is more akin to mathematical and logical proof than to scientific and historical proof. A mathematical or logical proof is the demonstration that, under the rules of mathematics or logic, one statement or symbolic formula is *equivalent* to another statement or formula. Each can be converted into the other without gain or loss. This is very like the way legal proof works. To say a burden of proof has been met is *equivalent* to saying the party who met it is legally entitled to the change it seeks in the legal *status quo*; the change sought is now legally compelled.

Legal Proof

That something has been proven legally brings the power of the state into play. This makes legal proof *different* from proof in other areas. Legal proof is also different from other kinds of proof because it is still a matter of discussion. Things have changed a great deal since the seventeenth century. One may still hear theological proofs in certain countries, but where I live one never hears them, and while philosophers may still talk about what counts as proof in science and mathematics, scientists and mathematicians do not. At least they do not talk about it as much as lawyers. Regular, everyday practical lawyers talk about proof all the time. In fact, it's *all* they do talk about.

Who has to prove a fact: who has the burden of proof? What facts have to be proven; what are the elements of a cause of action or defence? To what standard must a fact be proven: must it be proven beyond a reasonable doubt or only on a balance of the probabilities? To whom must proof be made: in what forum will a case be heard? What procedures are available to obtain evidence capable of proving what must be proven: is discovery available; how much pressure may be exerted to get a confession? What evidence is admissible to prove what must be proven: can hearsay be offered; are written documents admissible; is oral evidence to contradict a written document admissible; what about breathalyzer tests, fingerprints, DNA evidence, lie detectors?

Finally, and most important, what is the consequence of proof? What does the party who bears the burden of proof get for bearing it? What relief is available: damages, an injunction, punishment, a fine, rescission, a declaration? Can a judgment be enforced? Will a defendant be able to pay? Can a solvent defendant be compelled to pay? The most basic questions lawyers ask are, should we litigate, given the relief available? Is the

burden of proof worth bearing? Should we sue; should we prosecute? Maybe we can get what we want without going to court.

The major way lawyers try to get what their clients want *without* litigating is by drafting documents: contracts, wills, separation agreements, corporate by-laws, municipal by-laws, etc. Documents provide a way to determine who has what rights and duties, without fighting. Wills keep the kids from fighting. Contracts keep merchants from fighting. Separation agreements keep ex-spouses from fighting, as do pre-nuptial agreements.[24] In drafting a document, a lawyer is trying to *avoid* court and the problems of proving things, but every lawyer knows that no matter how carefully a document is drafted, it might still wind up in court. Every time a lawyer drafts a document, he or she knows it *could* wind up in court,[25] and then the questions will be, who will have to prove what, will evidence be available to prove it, what will be the standard of proof, etc.

Nowadays scientists, historians and mathematicians pretty much agree what counts as proof: lawyers are constantly spelling it out in great detail. In other areas, who must prove things is not even a question. In law, it is a matter of tremendous and continual controversy. In other disciplines, no one even speaks of the "standard" to which things must be proven; everywhere else, something is either proven or not.[26] In law, things are always proven to a *particular* standard. In law, we speak not just about *one* standard of proof, but about *two different* standards of proof. We even argue about whether there is a third.[27] In law, there are elaborate rules about presumptions and inferences. In other areas, these are either not allowed or are treated as matters of common sense. There is a legal series, now up to 140 volumes, called **Proof of Facts**, which contains thousands of separate little articles on how to prove various specific facts.

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[24] Treaties provide a way to keep nations from fighting and consitutions provide a way to keep a nation from fighting internally. These are public as opposed to private documents. I revert to this distinction at p. 48, n. 124.

[25] As I pointed out above, if it could not wind up in court, it would not be a "legal" document.

[26] If there is still some discussion in science of standards of proof it is certainly quieter than it *was* in the 1600s and *still* is in law.

[27] See Lecture II, p. 18.

Legal proof is different from other kinds of proof because it brings the power of the state into play.

Lawyers talk incessantly about proof and the burdens thereof.

Facts in Issue

Evidence is often imprecise. A witness who saw something three years ago for a few moments tells the jury what happened. Another witness tells the jury something different. The jurors then have to make up their minds about what happened. The goal of law is to make this process as precise as possible, to make it, if not exactly "scientific", then as close to scientific as we can get. The first and most basic way law does this is by carefully specifying exactly what facts the jury must find.

The facts the jury must find are called the "*facts-in-issue*".[28] What facts are in issue is determined for different types of trials by substantive law and in each particular trial by the pleadings of the parties. For the most part, substantive law is a specification of what facts must be proven to justify, that is, compel a court to grant a particular order. We refer to what a plaintiff must prove in a civil case as a "cause of action" and to what the prosecution must prove in a criminal case as the "material elements of an offence". When the defendant must prove something in a civil case we call that an "affirmative defence", and on the rare occasions when the defendant must prove something in a criminal case, we simply call that a "defence".

We take for granted that legal proof pertains to the facts in issue; what has to be proven in court are a certain number of discreet, specific facts. Facts that are not required to be proven may be proven if they are necessary to understand or provide a background or context for facts that must be proven, but facts that are not in issue are, strictly speaking, irrelevant. Proof of them is not only not required, it is generally not *allowed*. On rare occasions, a party may be permitted to prove something that the other party does not deny,[29] but in general, the only facts in issue are those alleged by one party and denied by the other.

The speeches the Greek orators constructed and presented in the Athenian courts of the fifth and fourth centuries BC indicate that in classical Greek law, trials were what we might call "at large", meaning that *nothing* was irrelevant. In a case on a contract, a litigant might remind the jury of how bravely he had fought against the Persians in the great victory at Salamis. We would say that the war record of the plaintiff or the defendant in a contract action was not relevant and could not be introduced into evidence. It could not be proven … except perhaps by having the plaintiff or the defendant arrive in court each day wearing a uniform with a chestful of medals. In his **Rhetoric**, Aristotle tells us that character (*ethos*) is "the most authoritative of proofs",[30] and a criminal

[28] I am not sure whether this should be facts in issue or facts-in-issue.

[29] *Castellani v. R.*. [1970] S.C.R. 310, 71 W.W.R. 147.

[30] Book I, Ch. 2, Line 4, 1356a. Jebb transl. (Cambridge U. Press. 1909).

Legal proof is of the facts-in-issue in a trial.

lawyer who neglected to tell a defendant to have a haircut and a shave and to appear in court in a suit would be guilty of professional misconduct.

The *reality* of modern trials may not be quite as different from the reality of Greek trials as our theory of proof suggests. Credibility and good character are in issue in our trials, but they are not *facts* in issue. According to modern theory of legal proof, the war record of the litigants in a contract action is irrelevant, and hence may not be introduced into evidence. Law, as we know it, does not proceed at large. It breaks the at-large question – who should win, the plaintiff or the defendant – down into small, precise questions of fact and law. This was not true in ancient Greece. Greek trials were different from ours. There were no judges in Greek courts, only juries, and the juries were composed of a minimum of 101 citizens. In really important cases there would be 1001 jurors and the litigants had to appear before the juries *personally*. A litigant might go to a famous orator for help in constructing an argument, but when it came to the trial, each litigant had to actually stand up in front of the jury and make his case.[31]

An Athenian court put the litigants themselves and not their dispute on trial. The jury tried the *people*, not the *case*. A litigant was a person, not a "legal" person with a lawyer to speak for him. Lawyers can and do make arguments that real people never could or would make. The lawyer for a sharpie who sold an old lady 30 years of dance lessons and wanted to hold her to the contract even after she got arthritis can get up in front of a judge, point to the contract and say: "*pacta sunt servanda*, contracts must be fulfilled". If the sharpie had to do this himself, in front of a jury of 101 of his fellow citizens, he'd be lucky if he didn't get ridden out of town on a rail.

Sir Henry Maine remarked that "the more progressive Greek communities … disembarrassed themselves with astonishing facility from cumbrous forms of procedure and needless terms of art, and soon ceased to attach any value to rigid rules and prescriptions".[32] It is lawyers and judges who use "terms of art" and it is lawyers, aided by judges, who manipulate "cumbrous forms of procedure". Our theory of proof depends on there being lawyers and judges. Without them, there can be no facts in issue and no legal proof, as we know it.

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[31] The male pronoun is appropriate here because women could not appear in Greek courts.

[32] **Ancient Law**, (1861), p. 61. I return to this quote in Lecture VI, p. 143.

In a legal trial, a certain number of discreet facts are in issue.
A fact is put in issue by the denial of an allegation.
The denial of an allegation creates a burden of proof.

Lecture II
Two Different Kinds of Legal Proof

There are two kinds of legal proof – ordinary proof and proof of guilt. Proof of guilt differs from ordinary legal proof both doctrinally and procedurally. Proof of guilt is closely associated with criminal trials, but the difference between ordinary legal proof and proof of guilt is not the same as the difference between civil and criminal trials. Proof of guilt is sometimes used in civil trials and ordinary proof is sometimes used in criminal trials. In this lecture I explore the procedural differences between the two kinds of legal proof and explain that one is associated with the idea of truth, while the other is not.

The Standards of Proof

To understand the difference between proof of guilt and ordinary proof, we must start with the difference between proof beyond a reasonable doubt and proof on a balance of the probabilities. Because it is harder to prove a fact beyond a reasonable doubt than it would be to prove exactly the same fact on a balance of the probabilities,[33] we say proof

[33] This difference is one of the reasons why it is harder for the prosecution to prove a fact in a criminal trial than it would be for a plaintiff to prove the same fact in a civil trial. Another reason is that there is no discovery in criminal trials. The prosecution's ability to *seize* documents and other items from criminal defendants may, in real terms, be roughly equal to a plaintiff's ability to *request* them, but legally the two are very different. A civil defendant is *obliged* to provide documents and other evidence requested by a plaintiff; a criminal defendant does not have to make things available for seizure by the prosecution. If a plaintiff requests a document or piece of physical evidence in the possession of a civil defendant and it is not provided, an inference may be drawn in favour of the plaintiff and against the defendant. If the police seek to seize a document or piece of physical evidence in the possession of a criminal defendant, the defendant is under no obligation to provide it. If the police can find what they seek, they may sieze it, but if they cannot find it, no inference can be drawn against the defendant.

A second, related, reason why it might be easier for a plaintiff to prove a fact in a civil trial than for the prosecution to prove the same fact in a criminal trial is that a civil defendant can be questioned by a plaintiff and if the defendant refuses to answer questions, an inference may be drawn against the defendant and in favour of the plaintiff. This can occasionally happen in a criminal case but not as a general rule. In general, the police can question a suspect, but no inference may be drawn from a criminal defendant's refusal to answer questions.

There isn't one thing called legal proof, there are two things called legal proof; they work differently in court and while one is about the "truth", the other is not.

The line between the two is almost the same as the line between criminal cases and civil ones, but it's not exactly the same. The difference is instructive.

beyond a reasonable doubt is proof to a *higher* standard than proof on a balance of the probabilities. But the difference between the two standards is not a difference *in degree*; it is a difference *in kind*. The two different standards of proof embody two different ideas of what it means to prove something. They are part of two different mental processes. A judge or juror is required to think in one way when deciding whether a fact has been proven beyond a reasonable doubt and in a different way when deciding whether a fact has been proven on a balance of the probabilities.

When one decides whether a fact has been proven on a balance of probabilities, one compares *two cases* and decides *which* to accept. When one decides whether a fact has been proven beyond a reasonable doubt, one judges *one case only*, and decides whether to accept it by measuring it against *an abstract, external standard*. Comparing two things with each other is different from evaluating one thing against an abstract standard. Deciding whether a fact has been proven on a balance of the probabilities is like deciding which of two people is taller. Deciding whether a fact has been proven beyond a reasonable doubt is like deciding whether a person is more than six feet tall.[34]

Properly speaking, the balance of the probabilities is not a standard of proof. It is just a way to make a decision. It is the ordinary way to make a legal decision. If someone makes an allegation and someone else denies it, law, because it is conservative, says: "prove it". An ordinary burden of proof arises when there is a denial of an ordinary allegation. The balance of the probabilities is a comparison of the allegation and the denial, against each other. If the case in favour of the allegation is more convincing than the case against it, law says the allegation has been proven. Otherwise, law says it has not. If it is impossible to choose between the allegation and the denial, law says the allegation has not been proven.

Lord Denning once said the "degree of cogency" required "to discharge a burden in a civil case" is "not so high as is required in a criminal contest"[35]. This is right, but Lord Denning also said something terribly wrong. He said "reasonable doubt" was

> simply that degree of doubt which would prevent a reasonable and just man from coming to [a] conclusion … When this is realized, the phrase

[34] To say, without irony, that the criminal standard of proof is "higher" than the civil standard of proof is like saying, without irony, that tigers are "bigger" than cats. Tigers *are* bigger than cats, but that's not what makes them circus attractions. When we call tigers "big cats", we are only ironically noticing how big they are. Underneath the phrase "big cat" is a realization that while it is pleasant to live in a house with a pussy cat, it is *dangerous* to be in a cage wth a big one. It's not just size that matters, so it is not a matter of *degree*.

[35] *Miller* v. *Minister of Pensions*, [1947] 2 All E.R. 372, 274, 63 T.L.R. 474 (K.B. Div.).

The balance of the probabilities is the ordinary legal way to decide whether something has been proven.

> "reasonable doubt" can be used just as aptly in a civil case … as in a criminal one.[36]

The phrase "reasonable doubt" *cannot* be used "just as aptly" in a civil case as in a criminal one. The phrase "reasonable doubt" is part of a distinctive thought process used for *one purpose only*: to assess the proof of a fact by the prosecution in a criminal trial.

> An individual charged with a criminal offence faces very grave social and personal consequences, including potential loss of physical liberty, subjection to social stigma and ostracism from the community, as well as other social, psychological and economic harms. In light of the gravity of these consequences, the presumption of innocence is crucial. It ensures that until the State proves an accused's guilt beyond all reasonable doubt, he or she is innocent.[37]

The presumption of innocence is partly a matter of practical consequences, but it is also a matter of ideology.

> The presumption of innocence protects the fundamental liberty and human dignity of any and every person accused by the State of criminal conduct.... This is essential in a society committed to fairness and social justice. The presumption of innocence confirms our faith in humankind; it reflects our belief that individuals are decent and law-abiding members of the community until proven otherwise.[38]

The best way to observe that there is an ideological component to proof beyond a reasonable doubt is to note that, though the consequences of some criminal trials are very much less serious than the consequences of some civil trials, proof beyond a reasonable doubt is required in *all* criminal trials and is not required in *any* civil trial. You can be sued for millions of dollars or stand to lose your home, and the fact that you are liable must only be proven on a balance of the probabilities. If you contest a traffic ticket, and the only possible punishment is a small fine, the fact that you were speeding must be proven beyond a reasonable doubt. This has to do with ideology, not consequences. We

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[36] *Bater* v. *Bater*, 1951 P. 35, 37 (C.A.).

[37] *R.*v. *Oakes* [1986] 1 S.C.R. 103, 119-20, (1986) 24 C.C.C. (3d) 321, 26 D.L.R. (4th) 200.

[38] Ibid.

Proof of guilt is a special form of legal proof created by the presumption of innocence.

think it is more serious when a court decides you have committed a crime, no matter how small the crime, than when a court decides you owe money to someone, no matter how much money you are said to owe. This ideology is named "The Presumption of Innocence".[39]

The Third Standard of Proof

The presumption of innocence gives rise to a distinctive kind of legal proof, proof of guilt. This kind of proof is used in all criminal cases, but it is not limited to criminal cases. Proof of guilt is also used in civil cases, if it is alleged that a person committed an immoral or an illegal act. When such an allegation is made in the civil context, the presumption of innocence generates an abstract external standard against which proof is judged. The presumption of innocence is weaker in a civil setting, so it creates a *third standard of proof*.[40] There is no standard formulation of the third standard of proof. It is 'higher' than the balance of the probabilities (in the ironic sense explained above) and lower than beyond a reasonable doubt (in a perfectly ordinary sense). The third standard of proof, often called "clear and convincing evidence"[41] is an external standard just like reasonable doubt, but it is a less exacting external standard, a lower standard.

The third standard has many names, for instance, in *Dr. Q.* v. *The College of Physicians and Surgeons of British Columbia*, a *civil* case involving a doctor accused of having had sexual relations with a patient, the court described the allegation as one of "infamous conduct" and said:

> The standard of proof required in cases such as this is high. It is not the criminal standard of proof beyond a reasonable doubt but it is something more than the bare balance of the probabilities.[42] The authorities establish

[39] I use the old fashioned orthography this once because it captures the ideological nature of the presumption of innocence. Other legal phrases that might be capitalized are The Rule of Law, The Sanctity of Property, *Pacta Sunt Servanda*.

[40] There are actually several more standards, but they are standards of "proof" not standards of proof. See **Appendix 1**.

[41] *U.S.* v. *Fatico*, 458 F. Supp. 388, 404, (E.D.N.Y. 1978).

[42] If nothing else demonstrated that ordinary legal proof and proof of guilt were different, the use of "bare" here would. We use "bare" and "merely" to talk of what is other.

The two kinds of legal proof do not work this way:
civil trials criminal trials
ordinary proof proof of guilt

They work this way:
civil trials criminal trials
-----ordinary proof
proof of guilt--------

> that a case against a professional person on a disciplinary hearing must be proven by a fair and reasonable preponderance of credible evidence [citations omitted]. The evidence must be sufficiently cogent to make it safe to uphold the findings with all the consequences for a professional person's career and status in the community.[43]

The third standard of proof is used when an insurance company alleges that the person claiming under a contract of fire insurance deliberately started the fire.

> The standard of proof which rests upon an insurer who alleges arson is well defined in the cases.... Because it is not a criminal case the criminal standard of proof, beyond a reasonable doubt, is not required. However, because of the seriousness of the allegation against the insured, the cogency of the evidence offered to support proof on a balance of the probabilities must be commensurate with the gravity of these allegations. The trial judge is justified in scrutinizing the evidence with even greater care than would ordinarily be used in a civil case where criminal or morally blameworthy conduct is not alleged. [44]

The third standard of proof also applies if a grievance is brought against an employer for an unjust dismissal and the employer alleges that the worker was fired because he or she was guilty of a criminal act.

> In discipline cases the onus is on the employer to prove that it had just and reasonable cause to discipline an employee.... [W]hile it is not appropriate to require management to meet the burden of proof imposed in a criminal prosecution, i.e. beyond a reasonable doubt, at the same time, there should be some difference on the standard of proof necessary to show cause for alleged misconduct which might have involved a criminal offence as opposed to other grounds for industrial discipline.... [T]he company must prove these allegations by "clear and convincing evidence".[45]

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[43] *Dr Q* v. *The College of Physyicians and Surgeons of British Columbia*, 2001 BCCA 241, Para. 21.

[44] *United Helicopter Ltd.* v. *Commonwealth Insurance Co.* (1985) 13 C.C.L.T. 144, 146 (B.C.S.C.)
N.B. The proposition in this case from the British Columbia Supreme Court is explicitly contradicted in *Continental Insurance* v. *Dalton Cartage,* [1982] 1 S.C.R. 164, 169, (1982), 131 D.L.R. (3d) 559, 563, by Chief Justice Laskin of the Supreme Court of Canada. "Where there is an allegation of conduct that is morally blameworthy or that could have a criminal or penal aspect and the allegation is made in civil litigation, the relevant burden (sic) of proof remains proof on a balance of probabilities." Laskin, C.J.'s authority for this proposition is the judgement of Ritchie J. in *Hanes* v. *Wawanesa Mutual Life Insurance* [1963] S.C.R. 154, 164, (1963) 36 D.L.R.(2d) 718, 736. In this judgment, Ritchie J. relied on the judgement of Lord Denning in *Bater* v. *Bater*, which I earlier said was "terribly wrong" (supra, n. 36). With the utmost repect, I repeat that comment. All three judges are theoretically misguided because they have not seen the point I make in this lecture.

[45] *Cantex Placer Ltd*. (1978) 18 L.A.C. (2d) 130, 134-5.

The third standard of proof is usually used when the defendant has the burden of proof, but it can also apply to plaintiffs. Thus, in divorce proceedings it used to be said that the plaintiff had to prove adultery to a higher standard.[46]

A Spectrum of Standards?

Some commentators resist the idea that there is a third standard of proof. Cross, for instance, denies the existence of a third standard and it is common to talk about the third standard of proof as if there were "variations" on the civil standard.

> "[T]he balance of the probabilities" is a variable rather than a precise formulation and one which will change with the circumstances of the case.... [W]hat arbitrators are doing, rather than requiring the employer to meet a standard of proof which falls between the criminal and civil burdens, is applying the civil standard, but in a flexible way...[47]

To say the balance of the probabilities "is a variable rather than a precise standard" implies that the standards of proof lie on a continuum. Thus, Lord Denning said,

> It is of course true that by our law a higher standard of proof is required in criminal cases than in civil cases. But this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond a reasonable doubt, but there may be degrees of proof within that standard. ... So also in civil cases, the case may be proved by a preponderance of probability, but there may be degrees within that standard.[48]

It is correct to say that the more serious the outcome, the more convinced a judge or jury should have to be before ordering that outcome. This is a simple matter of common sense, but there are no "*degrees* of proof"[49] within either the criminal standard or the civil standard.[50] There is no continuum of standards.

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[46] *Bastable v. Bastable* [1968] 3 All E.R. 701, 704 (C.A.).

[47] **Cross On Evidence**, (7th ed. by Tapper, 1990) p. 156-7.

[48] Brown and Beatty, **Canadian Labour Arbitration** (2nd Ed. 1984) p. 348-9.

[49] The phrase "degrees of proof" has no meaning in Common Law. The phrase "degrees of proof" plays, or at least, played a *very* important role in Civil Law proof. See n. 63, 361. It plays no role at all in Common Law proof. Perhaps one could say the difference between the criminal standard and the third standard was one of degree.

The balance of the probabilities is not a variable standard of proof.

Those who say the *standard* of proof varies from case to case really mean the onerousness of the burden of proof varies from case to case.[51] It is harder to prove some facts than others, but this is *not* because the standard of proof varies. Some assertions are simply more credible than others are, as are some denials. This is what we mean when we say, "That's a likely story."[52]

Some stories are inherently more credible than others. Witnesses and evidence can be more or less credible, too. Who and what is credible varies from case to case, from jury to jury, from judge to judge, from jurisdiction to jurisdiction and from time to time. You could once prove someone was a witch. Today, you wouldn't stand a hope in hell of proving someone's action had been caused by The Devil, no matter what standard you tried to prove it to.[53] The burden of proving this fact could simply not be borne today and that is not because the standard of proof varies. It is because we do not credit supernatural assertions today.

Different judges and juries find some facts inherently more plausible than others. Some facts can be proven to one jury or one judge that could never be proven to another. The same evidence might succeed in one court that would lose in another, but the balance or preponderance of the probabilities does not vary. It is constant. Are you more

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[50] To speak about either standard as if it varied according to the "seriousness" of the case is problematic at best. Common sense tells us some trials are "more serious" than others, but law cannot admit this. Law must treat all cases that are not dismissed as if they were equal. How can law say some trials – whether criminal or civil – are "more serious" than others? Wouldn't that imply that some trials are "less serious" than others? Would it then be acceptable for judges and juries to be cavalier in those cases?

The distinction between more and less serious legal trials, though very much a matter of common sense, is theoretically unsound. Moreover, it be would be *impossible* to apply. If you were sued for a million dollars, that would be more serious than if you were sued for a thousand dollars … unless you either didn't have a thousand dollars or had many millions. In these two cases, the suit involving a million would be no more or less serious than the suit involving a thousand.

The law might develop a "reasonable person" test, but a suit can be more serious to one person than another. Suppose a suit were of different importance for the two parties. Which party would the law look at? The one to whom the suit was more serious or the one to whom it was less serious? And anyway, the "seriousness" of a suit *cannot* be purely a matter of money. Where does a suit about your house rank? Or a suit about your job? Or a suit about your child? There would have to be an infinite number of gradations in the balance of the probabilities. To specify them is an impossible task and when the law undertakes it, problems are created. In Canadain administrative law, for instance, the "seriousness" of the consequences affects how much procedural fairness is required. *Baker* v. *Minister of Citizenship and Immigration* [1999] 2 S.C.R. 817. This test is legendarily problematic to apply.

[51] I discuss the onerousness of burdens of proof extensively in Lecture IV.

[52] The phrase "that's a likely story" can be used straight or ironically. If it really is a likely story, we are likely to accept it, meaning it is easy to convince us of its truth, easy to prove it. If we say "a likely story" ironically, we mean, you couldn't convince me of that unless you got my mother and a rabbi to swear to it.

[53] In *Norberg* v. *Weinrib*, a woman patient traded sex for drugs with her doctor. When she sued for battery, he responded that she had consented and she essentially said, the devil made me do it. Fiduciary duty and the positions of dominance and dependence are the closest modern equivalent to bewitchment and spells. For more on this case, see Lecture IV, p. 97.

convinced by the plaintiff than by the defendant? If so, the plaintiff wins. If not, the defendant wins.

Lawyers, judges and legal scholars sometimes say the burden of proof only matters when it cannot be decided whose case is stronger.[54] One can only think this way if one forgets that the balance of the probabilities, the standard used in ordinary legal proof, describes a way of thinking. It is not so much a standard of proof as a *technique* for deciding ordinary legal cases. This technique cannot and does not vary. It is what ordinary legal proof means. One person says, "He broke his contract or drove carelessly and I got hurt. He has to pay me." The other says, "No I didn't." The ordinary, natural, normal thing to say is if you believe the plaintiff more than the defendant, the plaintiff wins. If you believe the defendant more than the plaintiff, the defendant wins. When you're not sure, the defendant wins.[55]

Two Kinds of Legal Proof – A Summary Restatement

To summarize, in ordinary legal proof we use a *comparative* standard of proof. In proof of guilt we use an *abstract* standard. This marks the difference between *two fundamentally different ideas of what it means to prove something*.[56] *Ordinary legal proof* and *proof of guilt* are two different *kinds* of legal proof. Proof of guilt is created by the presumption of innocence and, naturally enough, it is very closely associated with *criminal* trials, but the line between ordinary legal proof and proof of guilt is *not the same* as the line between civil and criminal trials. When an allegation of moral guilt is made in a civil trial, the presumption of innocence applies and proof of guilt is used, not ordinary legal proof.

The same thing is true of criminal trials. When an issue not involving an allegation of guilt arises in a criminal trial – this is rare, but it does happen – the presumption of innocence does *not* apply and ordinary legal proof is used, rather than proof of guilt. A criminal defendant who claims the police entrapped him or her into committing the crime has the burden of proving this fact on a balance of the probabilities.

> I have come to the conclusion that it is not inconsistent with the requirement that the Crown prove the guilt of the accused beyond a reasonable doubt to place the onus on the accused to prove on a balance of

[54] See above, p. 8.

[55] Why? Because law is conservative. The legal *status quo* does not move unless someone causes it to move. One way to cause movement in the legal *status quo* is to bear the burden of proof. Other ways are to make a convincing legal argument, persuade the legislature, or revolt succesfully. See above, p. 1.

[56] That even "ordinary" people are beginning to understand the difference between the standards of proof was revealed by the O.J. Simpson trials. Many people still take that trial as proving only that law is stupid or that you can buy a verdict if you have enough money to hire Johnny Cochrane, but many non-lawyers were able to understand the difference between the two verdicts: not guilty and liable. Surely, every lawyer was able to understand the difference.

> the probabilities that the conduct of the state is an abuse of process because of entrapment.[57]

Entrapment is not seen as an issue to which the presumption of innocence applies.

> The guilt or innocence of the accused is not in issue. The accused has done nothing that entitles him or her to an acquittal; the Crown has engaged in conduct, however, that disentitles it to a conviction.[58]

Proof and Truth

No fact can be proven "beyond *all* doubt".[59] Barbara Shapiro describes how, during the 17th century, this realization was absorbed into English consciousness.[60] Before that, certain facts, as for instance, that God created the Heavens and the Earth, were taken to be known beyond *all* doubt. In the Age of Enlightenment, with science and exploration leading to a myriad of new facts, people started to realize that there was a distinction between the Truths of the Bible and the truths of science.

At the beginning of the 17th century, the Elizabethan Lord Chancellor, Sir Francis Bacon, a noted philosopher as well an amateur scientist and professional lawyer,[61] taught that we could make the claim to know facts, even though we did not know them certainly. This was a new way of thinking that overturned the distinction Aristotle had drawn between knowledge, truth and dialectic, on the one hand, and opinion, probable truth and rhetoric, on the other.[62] It was perceived that a lower order of Truth, what we might call truth with a small t, had to be accepted if any of the new knowledge was to count as

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[57] *R*. v. *Mack* [1988] 2 S.C.R. 903, 975.

[58] Ibid.

[59] On proof beyond all doubt, that is, conclusive proof, see Lecture V, passim.

[60] **Probability And Certainty in Seventeenth Century England**. (Princeton, 1983) Shapiro does not mention the fact that the fact that there cannot be any fact which is beyond all doubt is itself beyond doubt. She also does not mention the fact that the use of the standard of "beyond doubt" for questions of law reveals something very important about the distinction between questions of law and questions of fact. I will return to this question in Lecture VI.

[61] In 1621, Bacon was removed as Lord Chancellor for taking bribes. His defence was that he took them from both sides.

[62] **Rhetoric**, Book I, ch. ii, 14, 1357a.

Proof of guilt is about the truth. You must be morally convinced to say "guilty".

knowledge. The way this was managed was by devising standards of proof, which led to "moral certainty".

Following Bacon's teachings, the Royal Society initiated a project of collecting all the "facts" it could. These included facts of science, established by experiment, and facts of natural history and geography, established by the reports of explorers. The standard to which a fact had to be proven to qualify for inclusion in the collection was a subject of tremendous significance and the members of the Royal Society (professional scientists, such as physicists, chemists, botanists and doctors, as well as literate amateurs from other fields, like law and theology) engaged in an elaborate and very lively theoretical discussion about what constituted proof of a fact. It was obvious to these virtuosi that they were talking about a question common to science, history, geography, mathematics, logic, and theology.

It was also obvious to them that the same question arose in law, and it is no accident that proof "beyond a reasonable doubt" arose as a legal standard soon after the period Shapiro discusses. She quotes a 17th century lawyer as saying a jury is supposed to "sift out the Truth", and when they render their verdict, jurors should be "fully satisfied in their Consciences". Shapiro has no reason to notice that this comment, *and all the others* quoted in her discussion of 17th century proof, are about proof of guilt, not ordinary legal proof.

Much of the 17th century discussion of legal proof was conducted in terms of proving the charge of witchcraft. Thus, one lawyer says,

> If the suspicion upon great probability, and very strong presumptions, yet unless these doe leade to prove, that the suspected hath made a League and Compact with the Devill … they [the suspects] should be released.[63]

This is proof tested against an abstract, external standard.

Proof of guilt is about "truth" as this idea was reshaped in the 17th century. It is about moral certainty. Ordinary legal proof is not. Whatever external standard is used, when a juror finds that a fact has been proven to that standard, it makes sense to say the juror has sifted out "the truth".[64] People might disagree with a jury's verdict of guilty,

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[63] Shapiro, supra n. 60, at p. 204.

The "strong presumptions" referred to in the quote came from Continental thought, where a mechanical, Roman-canon scheme was used to categorize presumptions and to determine how many witnesses were needed for certain allegations and when torture was permitted. Damaška, **Evidence Law Adrift**, (Yale, 1997) p. 20-5.

As in Common Law, the Civil Law's "degrees of proof" were associated with proof of guilt, not ordinary legal proof. Thus, the rejection of the degrees of proof after the French Revolution led to what was called "free proof", of which Damaška says: "Although its true spiritual home was always criminal procedure, the principle radiated beyond, also effecting civil evidence – albeit to a much lesser degree." p. 21.

[64] Whether to use a capital T or a small t doesn't matter here.

but no one could disagree that each juror who voted to find someone guilty should be able to say, "My conscience is satisfied. The facts alleged are true."

A major difference between ordinary legal proof and proof of guilt is that in an ordinary legal situation, that is, a situation that does not involve the ideological presumption of innocence, "truth" is not involved. A juror's conscience should be satisfied if he or she was impartial and turned his or her mind seriously to the evidence. After that, it is not a matter of "truth" or "knowledge". It is simply a matter of which side was more believable. If a juror happens to think one side's case is so much stronger than the other's that he or she is truly convinced of the facts, that is an added bonus, but it is not required for ordinary legal proof. To put the matter numerically, a plaintiff is entitled to win if the relationship between the plaintiff's case and the defendant's case is 100/0 98/2, 75/25, 51/49 or even, 50.0001/49.9999. A conscientious civil juror, assessing ordinary legal proof, can vote for liability and say, "I don't think either side is telling the truth, but the judge said I had to choose between them. To me the plaintiff's case was *more* believable, so I'm voting for the plaintiff." If the juror thinks anything else, he or she votes against liability.[65]

Shifting and Splitting the Burden of Proof

The use of a comparative standard in ordinary legal proof and an abstract, external standard in proof of guilt is not the only difference between these two different kinds of legal proof. Another difference is in the *movement* of the burden of proof. The burden of proof always starts with the plaintiff or the prosecution. During a trial, it can move to the defendant. *The burden moves to the defendant differently in ordinary legal proof and proof of guilt*. In ordinary legal proof, the burden *shifts* to the defendant. In proof of guilt, the burden *splits* and *part* of it moves to the defendant. The other part remains where it was.

To understand the split burden of proof it is necessary to notice the distinction between the *persuasive* burden and the *evidentiary* burden. This distinction is universally recognized in Common Law and was first pointed out 100 years ago, by Dean

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[65] The failure to appreciate the doctrinal difference between proof of guilt and ordinary legal proof has led legal scholars to create the "blue bus" problem. I discuss it in **Appendix 2**.

Every burden of proof has two parts.

During a trial the burden can move from one party to the other. It can do this in two ways: the whole burden of proof can shift or part of it can split off and move by itself.

Thayer of Harvard Law School, who said the term "the burden of proof" was used to refer both to

> (1) the peculiar duty of him who has the risk of any given proposition on which the parties are at issue, – who will lose the case if he does not make this proposition out, when all has been said and done,

and to

> (2) the duty of going forward in argument or in producing evidence.[66]

Wigmore describes the persuasive burden as the burden of satisfying the jury and the evidentiary burden as the burden of satisfying the judge.[67]

Distinguishing between the persuasive and evidentiary burdens of proof serves two purposes. It allows the burden of proof to split, which is essential if part of it is to be on one party while part of it is on the other. It also allows judges to exercise a certain degree of control over juries. These two functions are separate. For the control function to be served, it is not necessary that the burden of proof be split. Judicial control is exercised when the burden is split, but it is also exercised when the two parts of the burden remain united.

The Unified Evidentiary and Persuasive Burdens

The evidentiary and persuasive burdens are always united at the start of a trial. When guilt must be proven, the evidentiary and persuasive burdens of proof split. One way ordinary legal proof is "ordinary" is that the internal relationship of the evidentiary and persuasive burdens does not change in ordinary legal proof. The evidentiary and persuasive burdens remain as they started – unified. The party with the unified evidentiary and persuasive burden of proof must first convince the judge and *then* convince the jury. Willes J. explained this in *Ryder* v. *Wombwell*:

> [T]here is in every case a preliminary question, which is one of law, viz. whether there is any evidence on which the jury could properly find the verdict for the party on whom the onus of proof lies. If there is not, the

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[66] J.B. Thayer, **A Preliminary Treatise on Evidence at the Common Law**, (1898) p. 355. Thayer also said there was "(3) An undiscriminated use of the phrase, perhaps more common than either of the other two, in which it may mean either or both of the others." This third use seems slightly ironic and we ignore it now.

It is remarkable that we should speak of the "evidentiary burden *of proof*", since whether an evidentiary burden has been met is always a question of law, not a question of fact. It is a question for a judge, not a jury, and the standard on the question is clearly less than a balance of the probabilities. We could perhaps explain this treatment by saying that whether an evidentiary burden has been met is a question of law *about* a question of fact, but I do not find this explanation very helpful. Many questions of law are about questions of fact. I suspect the usage is a mark of respect for Thayer. I certainly do not want to say he was even slightly wrong.

[67] **Evidence in Trials At Common Law**, (Chadbourne rev. Little Brown, Boston, 1981) s. 2487, p. 292-3.

> Judge ought to withdraw the question from the jury, and direct a nonsuit if the onus is on the Plaintiff, or direct a verdict for the Plaintiff, if the onus is on the Defendant. It was formerly considered necessary to leave the question to the jury, if there was any evidence, even a scintilla, in support of the case; but it is now settled that the question for the Judge ... is not whether there is literally no evidence, but whether there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established.[68]

The control this power gives judges over juries can be illustrated by *Metropolitan Railway Co.* v. *Jackson*.[69] Jackson was a passenger on the Metropolitan Railway in London. At King's Cross Station the carriage in which he was riding was full. At Gower Street Station there was a great demand for seats and three people forced themselves into the carriage where Jackson was seated. Since there were no seats vacant, the newcomers were obliged to stand.

> At the Portland Road Station there was a rush of fresh passengers. The door of the carriage in which Jackson sat was opened by some persons, who looked into the carriage, saw it full, and shut the door. Then others came, opened the door again, and some persons tried to get into the carriage. Mr. Jackson rose from his seat to prevent them.[70]

While Jackson was standing with his hand and his arms extended, the train began to move. Jackson put his hand on the lintel of the door to save himself from falling. As he did this, a porter came up, sent away the people who were trying to get in, and slammed the door shut. Jackson's thumb was caught in the door and crushed.

Jackson said the railroad was negligent. He said it was negligent of the porter to slam the door the way he did and he said it was negligent of the railroad not to have porters at Gower Street to stop people from getting into the full carriage. He offered as a witness, a passenger who had been on the train with him. The passenger said he saw no porters at Gower Street and Jackson argued that, from the facts taken as a whole, the jury could infer negligence.

The railroad argued that the presence or absence of porters at Gower Street was irrelevant: it had nothing to do with the accident. The railroad also said that the porter at Portland Road *had* to slam the door quickly because the train was leaving the station and about to enter a tunnel. They said the accident had been caused by Jackson standing up when he should not have and putting his thumb in the door hinges. The railroad argued there was no evidence from which a reasonable jury could find or infer that it or its porter had been negligent. They asked the judge to direct a verdict for them.

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[68] (1868) 4 L.R. Exch. 32, 38.

[69] (1877) 3 L.R. App. Cas. 193 (H.L.)

[70] Id. at 194.

The trial judge refused. He allowed the case to go to the jury, which found for Jackson. The railroad appealed. The first appellate court sustained the trial decision, so the railroad appealed again. The second appellate court divided equally on whether to sustain or reverse, so once again the trial decision was sustained.[71] The railroad appealed a third time, to the House of Lords, and the House of Lords reversed the trial decision, holding that there had not been enough evidence to send the case to the jury.

> The judge has a certain duty to discharge and the jurors have another and a different duty. The judge has to say whether any facts have been established by evidence from which negligence may be reasonably inferred; the jurors have to say whether, from those facts, when submitted to them, negligence *ought to be* inferred. It is, in my opinion, of the greatest importance in the administration of justice that these separate functions should be maintained and should be maintained distinct. It would be a serious inroad on the province of the jury, if, in a case where there are facts from which negligence may be reasonably inferred, the judge were to withdraw the case from the jury upon the ground that, in his opinion, negligence ought not to be inferred; and it would, on the other hand, place in the hands of the jurors a power which might be exercised in the most arbitrary manner, if they were at liberty to hold that negligence might be inferred from any state of facts whatever.[72]

Lord Cairns went on to indicate the fears he had of what a jury might do:

> To take the instance of actions against railway companies; a company might be unpopular, unpunctual, and irregular in its service; badly equipped as to its staff; unaccommodating to the public; notorious, perhaps, for accidents occurring on the line; and when an action was brought for the consequences of an accident, jurors, if left to themselves, might, upon evidence of a general carelessness, find a verdict against the company in a case where the company was really blameless.[73]

We have juries because we used to believe it was important for certain decisions to be made by juries, rather than judges. We use juries today much less than we used to. This may mean we no longer think they are as important, but even at the height of their use, judges distrusted them. A judge might think the party with the burden of proof had failed entirely to meet it, but a jury might come in with a verdict for that party. The evidentiary burden is a legacy of this distrust.

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[71] There is no more graphic illustration of the essentially conservative nature of law described in Lecture I.

[72] Id. at 197.

[73] Id. at 197-8.

There is an evidentiary burden on *every* fact in issue. A judge must always decide whether there is enough evidence to submit a case to the jury. Using the evidentiary burden to control juries has nothing to do with splitting the burden; a judge can use the evidentiary burden to control a jury even when the evidentiary and persuasive burdens are united. When the burden is unified, the party with the persuasive burden, the burden of persuading the jury, has the evidentiary burden as well, the burden of persuading the judge that there is enough evidence to warrant putting the case to the jury. This is the whole point of both *Ryder* v. *Wombwell* and *Metropolitan Railway* v. *Jackson* and before we look at how and why the burden splits in proof of guilt, it is helpful to look at how and why the unified burden of proof moves in ordinary legal proof.

Shifting the Burden of Proof: Pleading

In all trials, the evidentiary and persuasive burdens of proof start together and they always rest with the party who commenced the legal proceeding: the prosecution in a criminal case, the plaintiff in a civil case. To understand how and why the unified burden shifts to the defendant in an ordinary legal trial, it is necessary to understand the legal process by which facts are put in issue. This process is called "pleading".[74]

To start a civil case, the plaintiff files a document or pleading setting out the facts on which his or her claim against the defendant is based. In some jurisdictions, this document is called a "statement of claim", in other jurisdictions, it has other names. A statement of claim must set out facts that state a cause of action, that is, facts that, if proven, give the plaintiff a legal right to have the court make an order against the defendant. To start a criminal case, the prosecution files a document like a statement of claim. This is usually called an "indictment" or an "information", but it too has different names in different jurisdictions. Like a statement of claim, an indictment sets out the facts on which the charge against the defendant is based. An indictment must set out facts that cover the elements of an offence, that is, facts, which, if proven, constitute a crime and confer on the court the legal right to order that the defendant be punished.[75]

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[74] We sometimes speak of the "burden of pleading".

> I have not adverted to the point which was raised as to the case being governed by Spanish law, for I think that if that law was more favorable to the plaintiffs, the onus was on them to allege and prove it. *Milroy* v. *Jones* (1862) 45 E.R. 1185, 1191.

The onus of alleging a fact, the burden of pleading it, means that if a party could have alleged a fact and does not do so, that party cannot rely on that fact later. If the plaintiff pleads one injury that was caused by the defendant and does not plead another, the plaintiff cannot recover for the second injury, even if the second injury is proven. This same burden of pleading applies in criminal cases, indeed, it may apply even more strictly in criminal cases. If the prosecution charges the defendant with one crime and does not charge the defendant with another crime, the defendant cannot be convicted of the second crime even if the prosecution proves that the defendant committed the second crime.

[75] The requirement that an indictment or information must set out facts covering ***all*** the elements of an offence is taken very strictly. Thus, if the offence is publishing a materially misleading representation, as it is under s. 52 of the Canadian *Competition Act*, R.S.C. 1985, c. C-34, an information which does not include the word "materially" is defective. *R.* v. *Acme Novelty (B.C.) Ltd.* (1972) 7 C.C.C. (2d) 216 (B.C. Co. Ct.).

We are inclined to think, and therefore to talk as though the prosecution had the burden of proving *all* the facts alleged in the indictment, and the plaintiff, the burden of proving *all* the facts alleged in its statement of claim. However, as Julius Stone has pointed out, we cannot speak of there being a burden of proof in either a criminal or a civil case until the defendant has pleaded and put the facts in issue by *denying* them. "[W]hen A issues his writ against B for goods sold and delivered it may be loosely said that the burden is on him to prove sale and delivery. It would however, be wrong to say so, for before B has made his defense there can be no burden of proof on any issue."[76]

If B does not deny the sale and delivery, the plaintiff never has the burden of proving them. Similarly, the prosecution's burden of proving the allegations of fact in an indictment only arises when a criminal defendant pleads not guilty. If a criminal defendant pleads guilty, the prosecution has no burden of proof. "A plea of guilty to a criminal charge is an admission by the accused of all the legal ingredients necessary to constitute the crime charged and dispenses with the necessity of proof of the ingredients."[77]

Burdens of proof do not arise until an allegation of fact is put in issue by a denial. In a civil case, the defendant must file what is called an "answer" to the plaintiff's statement of claim. If the defendant fails to answer the claim of the plaintiff, the plaintiff has no burden of proof and there is no trial: default judgment is given for the plaintiff. Like the prosecution's burden of proving the facts alleged in an indictment, the plaintiff's burden of proving the facts alleged in a statement of claim arises when the defendant denies those facts.

A statement of claim and an indictment are essentially the same thing: each is a list of allegations that, if denied, must be proven. The difference between ordinary legal proof and proof of guilt starts with the pleading of the defendant. Understanding the difference between the plea of a civil defendant and the plea of a criminal defendant is essential to understanding why the burden of proof splits in proof of guilt and remains unified for ordinary legal proof.

The pleading of a criminal defendant is quite simple. Basically, a criminal defendant must plead either guilty or not guilty.[78] A plea of guilty, as I have indicated, means the prosecution does not have any burden of proof. A plea of not guilty puts into

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[76] *Burden of Proof and the Judicial Process* (1944) 60 L.Q.R. 262, 263.

[77] *R.* v. *Lucas* (1983), 9 C.C.C. (3d) 71, 77 (Ont. C.A.) Of course, the judge will often hear enough evidence to convince him or herself that the guilty plea is supported by the facts and there is authority for saying the judge should hear such evidence.

[78] An accused ... may plead guilty or not guilty, or the special pleas authorized by this Part and no others. *Criminal Code*, R.S.C. 1985, c. C-34, s. 606(1). The special pleas are *autrefois acquit*, *autrefois convict* and pardon. Id. at s. 607. I discuss the first two *very* briefly in Lecture V, p. 140.

issue all the facts in the indictment and casts the burden of proving the material elements of the offence on the prosecution.[79]

In a civil case, the pleading of the defendant is much more complicated. The answer a civil defendant files may take three forms.

1. The defendant may move for a dismissal of the action on the ground that the plaintiff's statement of claim does not state a cause of action.

In other words, the defendant may say that the action could not succeed even if the facts alleged by the plaintiff were proven. Until quite recently, this was called a "demurrer" and since it raises an issue of law, rather than an issue of fact, on traditional legal theory a demurrer attracts no burden of proof.

2. The defendant may deny one, several or all of the facts alleged in the plaintiff's pleadings.

The defendant's denial of a fact casts the burden of proving that fact on the plaintiff. This is Stone's point: without the defendant's denial there is no burden of proof. If the defendant does not deny a fact, that fact is taken to be admitted and the plaintiff does not have the burden of proving it.

3. The defendant may allege new facts, which, if proven, defeat the plaintiff's claim.

Affirmative Defences

To allege new facts that would defeat the plaintiff's claim is called "raising an affirmative defence." Affirmative defences are used in ordinary legal proof. They are not used in proof of guilt, or not used the same way. An example of an affirmative

[79] In a modern criminal case, if the defendant refuses to plead either guilty or not guilty, a plea of not guilty is entered for the defendant and the trial on the issue of the guilt of the defendant then proceeds as if the defendant had pleaded not guilty. "Where an accused refuses to plead ... the court shall order the clerk of the court to enter a plea of not guilty." *Criminal Code*, R.S.C. 1985, c. C-46, s. 606(2).

This was not the ancient form. The theory of pleading used to be stricter. No plea could be entered for a defendant. If a criminal defendant refused to plead, the court lacked jurisdiction to try the case because no issue had been joined for trial. Since the sentence for those convicted of many crimes was death, and convicted felons forfeited all their property to the Crown, defendants who thought they were likely to be convicted might refuse to plead. They could, and often would, be kept in prison, but they could not be executed and their families would not lose their property when they died.

Peine forte et dure was a pre-trial procedure used to force an accused to plead either guilty or not guilty. Stone weights were piled on the chest of the accused, the weights being made heavier and heavier, until the accused either pleaded or was crushed to death. Defendants who felt sure they would be found guilty if their cases went to trial refused to plead and accepted being crushed to death in preference to being executed. Since they had not been convicted of a crime, their families could inherit their property and they could be buried in sanctified ground.

defence can be seen in the case mentioned earlier, *Ryder* v. *Wombwell.*[80] In this classic case, a jeweler sued a rich young man for two items the young man had purchased on credit: a pair of diamond-and-ruby cufflinks and a silver-and-gold cup. The young man defended the suit on the ground that he was less than 21 years old when he contracted the debts. Ordinarily, since a minor cannot enter into a valid, binding contract, the debts of a minor cannot be enforced and the young man's assertion that he was a minor when the debt was incurred is a classic affirmative defence. It is also an affirmative defence when the defendant in a libel action, instead of denying the allegation of saying or writing certain things about the plaintiff, claims that what was said or written about the plaintiff was true.

If the defendant raises an affirmative defence, the plaintiff must answer it. If the plaintiff does not deny the facts alleged in the affirmative defence, they are taken to be admitted and there is no burden of proving them. The affirmative defence succeeds and the plaintiff's action is summarily dismissed. If the plaintiff does deny the facts alleged by the defendant in an affirmative defence, then the plaintiff's denial casts the burden of proving those facts on the defendant.

A criminal defendant does not have to be particular in his or her plea. A plea of not guilty by a criminal defendant includes all three of the different answers a civil defendant may make to a statement of claim. A civil defendant's answer, on the other hand, does have to be particular. A civil defendant must indicate which of the three types of answers is being made, but a civil defendant is not confined to making only one type of answer.

The single most complicating thing about burden of proof is that a civil defendant does not have to pick one way of answering to the exclusion of the other two. A civil defendant may, and usually will, take two or three of the available tacks *in the alternative*. A defendant's answer will normally say that the plaintiff's claim is bad in law; and in the alternative, if the plaintiff's claim is not bad in law, the defendant denies the following facts alleged by the plaintiff; and in the further alternative, if the facts alleged by the plaintiff are true, the defendant alleges the following facts that defeat the plaintiff's claim.

Pleading in the Alternative

It is pleading in the alternative on the facts, denying some and alleging others, that causes the united burden of proof to shift in an ordinary civil trial. When the defendant denies the facts alleged in the plaintiff's claim, this casts the united burden of proving those facts on the plaintiff. When the defendant alleges facts in an affirmative defence, this (coupled with the plaintiff's denial of those facts) casts the united burden of proving those facts on the defendant. When the facts in issue change from those alleged in the

[80] See, n. 68.

plaintiff's claim to those alleged in the defendant's affirmative defence, the united burden of proof shifts from the plaintiff to the defendant.[81]

The burden of proof can shift back and forth because there is no limit to the number of pleadings the parties can file. A plaintiff can file a rebutter to a defendant's answer, a defendant can file a sur-rebutter to a plaintiff's rebutter, a plaintiff can file a rejoinder to a defendant's sur-rebutter, and a defendant can file a sur-rejoinder to the defendant's rejoinder. Each of these can be in the alternative, and every time a new pleading is filed that denies facts in the last pleading and asserts new facts, the burden of proof, with both its evidentiary and ultimate components, shifts.

In *Ryder* v. *Wombwell*, the jeweler responded to the defendant's affirmative defence of minority by arguing that while a minor's debts could not normally be enforced, these debts could be enforced because they were contracted for "necessaries". The legal rule was (and still is) that while a minor's contracts cannot be enforced, a minor's contracts for "necessaries" can be enforced.[82] The actual case of *Ryder* v. *Wombwell* dealt solely with whether the cups and the cufflinks were necessaries, but if we imagine what the full pleadings in such a case might have been like, we can see how the burden of proof shifts.

The jeweler, as the plaintiff, had to plead the fact of the sale on credit and the fact that he had not been paid. The defendant, the young man, might have answered in the alternative, saying, I never bought the cufflinks and the cup; and in the alternative, if I did buy the cufflinks and the cup, I paid for them; and in the third alternative, if I bought the cufflinks and the cup and did not pay for them, I was under the legal age to make a valid contract when the transaction took place. Then, the jeweler would have answered the young man. He would have said, you were not a minor when the sale took place; and in the alternative, if you were a minor, the contract was for necessaries.

If there had been the kind of alternative pleading I have indicated, the burden of proof would have shifted *twice* in the case: once from the jeweler to the young man and

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[81] Wigmore insisted there was no "shift" here. According to Wigmore:

> The duty of producing evidence to satisfy the judge *does have* this characteristic referred to as a "*shifting*". (emphasis in the original)

but

> [t]he risk of non-persuasion of the jury *never shifts* .... (emphasis in the original) **Evidence in Trials At Common Law**, (Chadbourne rev. Little Brown, Boston, 1981) s. 2489, p. 300-1.

What Wigmore meant was that the burden of proof on the different facts was assigned to the respective parties from the start of the trial, and therefore, could not be said to "shift". Wigmore was right about this, but he was not successful in changing the common usage among lawyers. When the issue changes from one on which the plaintiff has the burden, to one on which the defendant has the burden, lawyers say the burden has "shifted".

[82] This rule had been created for the benefit of young men at Cambridge and Oxford, so that merchants would extend credit to them for things they needed, like the boarding of their horses.

once from the young man back to the jeweler. First, the jeweler would have had the burden of proving the sale and non-payment. Then, the burden of proof would have shifted and the young man would have had the burden of proving his minority. Then, the burden of proof would have shifted again and the jeweler would have had the burden of proving the fact that turned out to be the issue in the case, namely, that the cufflinks and the cup were necessaries.

In our trials, evidence is presented on all the issues at once.[83] This sometimes makes it hard to see the movement of the burden of proof during a trial. The fact that the burden of proof shifted during a trial usually becomes clear only on appeal. This is because there are three points in a trial when the movement of the burden of proof is critical. The first is at the close of the plaintiff's case, when the defendant can argue that case should be dismissed because the plaintiff has not met an evidentiary burden of proof. The second is at the close of the defendant's case, when the plaintiff can argue that the affirmative defence should be "dismissed" or ignored, because the defendant has not met an evidentiary burden of proof. The third is when the judge instructs the jury about who has the ultimate burden of proof on each issue. The reason movements of the burden of proof tend to become apparent on appeal is that at each of these three points, a question of law is involved and, these are the points that produce the grounds for appeal.[84]

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[83] Roman law, from whose *onus probandum* our burden of proof was derived, did not have this problem. According to Thayer, *Burden of Proof*, (1890) 4 Harv. L.R. 45, 55, Roman law was conceptually clearer than our law. In Roman law it was not possible to plead in the alternative. If the defendant denied the allegations in the plaintiff's claim, there would be a trial on the issues of fact in the plaintiff's claim. In this trial, the plaintiff would have the burden of proof, and at the end of this trial, a judgment would be rendered for or against the plaintiff depending on whether or not the plaintiff had succeeded in bearing the burden of proof. If the plaintiff failed, the case was over. If the plaintiff succeeded, the defendant would then be allowed to raise any affirmative defences it had and there would then be another trial on the defendant's affirmative defences. In this trial, the defendant would have the burden of proof. If the defendant did not meet the burden of proving the facts in its affirmative defence, the plaintiff won the case. If the defendant did meet the burden of proving the facts in its affirmative defence, the defendant would win, unless, as happened in *Ryder* v. *Wombwell*, the plaintiff had a response to the affirmative defences. Then there would be a third trial, in which the plaintiff would again have the burden of proof.

In our trials, the series of trials that would have taken place under the Roman system are combined in one. This makes our law more efficient than Roman law, but at the same time, it makes it conceptually messier. Under our law, the facts on which the plaintiff has the burden of proof and the facts on which the defendant has the burden of proof are all at issue in one trial, and we do not divide a trial up issue by issue. We try all the issues raised by the various pleadings at once and allow each side only one chance to present evidence on all the issues. Thus, the plaintiff has one opportunity to present evidence on *all* the issues in the pleadings, regardless of who has the burden of proof on those issues, and when the plaintiff has finished presenting evidence, the defendant has one opportunity to present evidence on *all* the issues, again, regardless of who has the burden of proof on those issues.

[84] The other big source of appealable issues is the decision on a demurrer.

Splitting the Burden of Proof

In a criminal trial, the evidentiary and persuasive burdens start on the prosecution. Saying that the prosecution has the evidentiary burden of proof means the prosecution must present its evidence first and the evidence offered by the prosecution must be sufficient to convince a reasonable jury that every material fact alleged in the indictment is true beyond a reasonable doubt. Whether the prosecution has presented enough evidence on each fact is decided by the judge when the prosecution closes its case. If the judge decides the prosecution has not met its evidentiary burden of proof on all of the facts in the indictment, the case is not even submitted to the jury. It is simply dismissed. If the judge rules that the prosecution has met the evidentiary burden of proof on all the facts in the indictment, the case will go to the jury, but first, if the defendant wishes, the defendant has an opportunity to present evidence. The defendant is not required to present any evidence because the defendant does not have the burden of proof, but if the defendant wishes to, he or she may present evidence to weaken or contradict the evidence presented by the prosecution.

In a *civil* case, the burden of proof *shifts* to the defendant if the defendant, in answer to the plaintiff's statement of claim, not only denies some or all of the facts alleged by the plaintiff, but also presents an affirmative defence. In presenting an affirmative defence, the defendant makes new allegations, which the plaintiff then denies. The burden of proving the facts alleged in the affirmative defence is on the defendant. The defendant in a *criminal* case does not have to plead specifically in the way the defendant in a civil case does. A criminal defendant does not have to plead affirmative defences, so does not have to allege facts in his or her own defence. The plea of not guilty raises all defences without any allegation of fact by the criminal defendant. That the criminal defendant does not have to allege facts in an affirmative defence means that the burden of proof does not ordinarily *shift* in proof of guilt; it *splits*.

What it means to say the burden of proof splits in a criminal trial is that many of the defences that a criminal defendant might wish to raise, such as necessity, will not be put to the jury unless there is some evidence on which the jury could find for the accused.

> Although necessity is spoken of as a defence, in the sense that it is raised by the accused, the Crown always bears the burden of proving a voluntary act. The prosecution must prove every element of the crime charged. One such element is the voluntariness of the act. Normally, voluntariness can be presumed, but if the accused places before the court, through his own witnesses, or through cross-examination of the Crown witnesses, evidence sufficient to raise an issue that the situation created by external forces was so emergent that failure to act could endanger life or health and upon any reasonable view of the facts, compliance with the law was impossible, then the Crown must be prepared to meet that issue. There is no [persuasive] onus of proof on the accused.[85]

[85] *Perka* v. *R.* [1984] 2 S.C.R. 232, 42 C.R.(3d) 113, 137.

The accused does not have to plead necessity. A plea of not guilty raises the defence of necessity if there is evidence to support that defence. Another way of saying this is that the criminal defendant has the evidentiary burden on the defence of necessity. If the accused wants the jury to consider the defence of necessity, the accused has the burden of providing evidence to support it, evidence on the basis of which the jury could find in favour of the accused. The evidence may be in the prosecution's case or the accused may provide it in his or her own case, either through witnesses or by his or her own testimony.

When we say that the burden of proof splits on the issue of necessity, we mean the evidentiary burden of proof moves to the accused on the defence of necessity, but the persuasive burden of proof does not. The persuasive burden of proof remains on the prosecution. If the accused succeeds in meeting the evidentiary burden and the issue of necessity goes to the jury, the accused does not have the burden of convincing the jury that he or she was forced to commit the crime. The jury will be instructed that the prosecution has the burden of convincing them, beyond a reasonable doubt, that the accused was *not* forced to commit the crime. The burden of proof does not shift on the defence of necessity; it splits.

The same thing happens when the issue is self-defence.[86] *R.* v. *Lavallee*,[87] a decision of the Supreme Court of Canada, reverses a Nova Scotia decision that held that where a battered wife who was not under immediate attack killed her husband, it was wrong for the judge to submit the issue of self-defence to the jury. *Lavallee* holds that, even though at the time of the killing she was not under the threat of an imminent attack, a battered wife who kills her husband can be found to have acted in self-defence. *Lavallee* holds that evidence that the accused was battered by the husband whom she killed, plus psychiatric evidence about the effects of being battered, can meet the evidentiary burden of proof on the issue of self-defence. The judge can put the issue of self-defence to the jury and if the judge does so, the prosecution then has the burden of proving beyond a reasonable doubt that the wife was not acting in self-defence.

A third defence on which the burden of proof splits is mistake of fact. In *R.* v. *Pappajohn* the defendant was charged with sexual assault.[88] The complainant, a real estate agent, testified that she was showing a house to the defendant and while she was alone with him in the house, he forcibly assaulted her. She said she screamed and

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[86] *R.* v. *Lobell* [1957] 1 Q.B. 547; *Miska* v. *Sivec* 18 D.L.R. (2d) 363 (Ont C.A.) Smith & Hogan, **Criminal Law** (6th ed, Butterworths, London, 1988) p. 31.

[87] [1990] 1 S.C.R. 852, [1990] 4 W.W.R. 1, 76 C.R. (3d) 329.

[88] [1980] 2 S.C.R. 120, 52 C.C.C. (2d) 481, 14 C.R. (3d) 243, 111 D.L.R. (3d) 1, [1980] 4 W.W.R. 387.

Characteristically, the burden of proof shifts in ordinary proof and splits in proof of guilt.

protested, but the defendant forced himself on her. The defendant admitted that he and the complainant had engaged in sex, but he said that she had consented and participated eagerly.

Consent is not an issue on which the burden of proof either shifts or splits. Lack of consent is an element of the crime of rape. In *Pappajohn*, as in every rape case, the prosecution had the united evidentiary and persuasive burden of proving lack of consent. The prosecution had to offer evidence that the complainant had not consented. This evidence had first to satisfy the judge that a jury could find lack of consent had been proven beyond a reasonable doubt and then the evidence had to convince the jury beyond a reasonable doubt that the complainant had not consented.

In *Pappajohn*, the defendant asked the judge to instruct the jury on the defence of *mistake of fact* as to consent. The defendant said the judge should instruct the jury that the prosecution not only had the burden of proving lack of consent, it had the burden of proving that the defendant had not made a mistake about whether or not the complainant was consenting. The defendant said the judge should instruct the jury that if it had a reasonable doubt about whether or not the defendant had made a mistake concerning the complainant's consent, it should acquit him.

This was a correct statement of the law at the time, but the judge refused to give the jury the instruction the defendant requested. The judge said the defendant had not met the evidentiary burden of proof on the defence of mistake of fact as to consent. The judge said the evidence did not raise the issue of mistake of consent. On the evidence, the judge said, the jury could find that the complainant had consented or that she had not consented, but there was no evidence on which the jury could find that while the complainant had not consented, the defendant had made a mistake and thought she was consenting. This ruling was sustained by the Supreme Court of Canada, which said that the defendant had the burden of offering evidence to lend the defence of mistake of fact as to consent an "air of reality".[89]

In a criminal case, the burden of proof also splits on the issues of duress,[90] intoxication,[91] automatism,[92] sleepwalking[93] and provocation.[94] On all of these defences, the defendant has the burden of presenting enough evidence to raise the issue. This

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[89] Id. at 133.

[90] *R.* v. *Gill* [1963] 2 All E.R. 688 (C.A.). Williams, **Criminal Law, The General Part** (2nd ed. Stevens, London, 1961) p. 762.

[91] *Malanik* v. *R.* [1952] 2 S.C.R. 335, Williams, id. at 571-2.

[92] *Rabey* v. *R.* [1980] 2 S.C.R. 513, *Hill* v. *Baxter* [1958] 1 Q.B. 277, Williams, id. at 886-7.

[93] Williams, id. at 482-3.

[94] *Linney* v. *R.* [1978] 1 S.C.R. 646, Williams, id. at [892-3], *Holmes* v. *D.P.P.* [1946] A.C. 588, [1946] 2 All E.R. 124 (H.L).

requirement means that if the defendant does not present enough evidence to raise the issue, it will not be put to the jury, but if the defendant does present enough evidence to raise any of these issues, the prosecution has the persuasive burden, the burden of convincing the jury, beyond a reasonable doubt, that there was *no* duress, intoxication, etc.

Wigmore's Treatment of the Split Burden

Splitting the burden of proof is part of *proof of guilt* and is, therefore, *characteristic* of criminal trials. But the early editions of **Wigmore**, mention *no* criminal cases in connection with splitting the burden of proof,[95] and the later editions mention only a few. Wigmore *never* says splitting the burden of proof is associated with proof of guilt, and does not treat the few criminal cases he mentions as typical or special in any way. The impression conveyed by Wigmore is *exactly* the reverse of what is true. The sense one gets from Wigmore is that it is precisely in ordinary legal proof that one would expect the burden of proof to split.[96]

One of the civil cases cited in **Wigmore** as an example of splitting the burden of proof is *Speas* v. *Merchant Bank*.[97] *Speas* is an action under a South Carolina anti-usury statute allowing a borrower to sue a lender for "penalties" where the rate of interest on the loan was more than 6% per annum.[98] The bank's defence in *Speas* was that it should not have to pay the penalties because it only charged the interest as agent for another bank, and the plaintiff was aware of this fact. The Supreme Court of North Carolina upheld a trial court's decision that, while the burden of offering evidence that it had only acted as an agent shifted to the defendant, the ultimate burden of proving that the defendant was 'guilty', and hence, responsible for the penalties, was on the plaintiff.

This case is civil in *form*, but *quasi-criminal* in nature, as is *Overman* v. *Loesser*, another civil case used in **Wigmore** to illustrate splitting the burden.[99] In this case, Frank

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[95] The first two editions of **Wigmore on Evidence** explain splitting the burden of proof ***exclusively*** in terms of civil cases. 1st Canadian Ed. 1905, Vol. IV, sec. 2487 and 2489, p. 3526-3529 and 3531-3532. 2nd Ed. 1923, Vol. V, sec. 2487 and 2489, p. 442-447 and 448-9. It was not until the third edition that Wigmore gave even one criminal case as an example of the split burden of proof, and that one case is listed in a footnote, without comment, in the middle of several citations to civil cases. 3d Ed. 1940, Vol. IX, sec. 2489, n. 2, p. 286.

[96] The best analogy I can think of would be explaining proof beyond a reasonable doubt in terms of civil cases. Lest you think this could not be done since there are no civil cases in which this standard of proof is used, see below, n. 125.

[97] 125 S.E. 398 (1924). This is the leading case that is offered as an example of splitting the burden of proof in the third and subsequent editions of **Wigmore on Evidence**.

[98] 6% is not a typrographical error, unless it occurred in the case report. The rate of criminal interest in Canada today is 60%. *Criminal Code*, R.S.C. c. 46, s. 347. I discuss inflation in **Appendix 8**.

[99] 205 F.2d 521 (9th Cir. 1953). This case is cited in the most recent edition of **Wigmore on Evidence** (Chadbourne rev. 1981) at Vol. IX, sec. 2487, n. 8, p. 298.

Loesser, the composer of "On a Slow Boat to China" was sued by another composer who said Loesser had copied "On a Slow Boat to China" from a song he had written. Overman introduced evidence that "On a Slow Boat to China" was very similar to his song, "Wonderful You", and he also

> introduced evidence that he ... had composed "Wonderful You" in the fall of 1946...; he had met Loesser in January, 1947; Loesser had invited Overman to submit some songs for consideration; Overman had sent a piano arrangement of "Wonderful You" to Loesser's New York office in January, 1947; ... Loesser's secretary in response to an inquiry made in May, 1947, [said] that Loesser has "Wonderful You" on his desk; Overman' music was returned to him without comment or explanation in May, 1947; Loesser obtained an unpublished copyright on "Slow Boat" in May 1948....[100]

In a plagiarism case, if the plaintiff offers evidence that the defendant had prior access to a markedly similar work, a presumption of plagiarism arises. This presumption shifts the evidentiary burden of proof to the defendant. The defendant must offer evidence that there was no plagiarism. If the defendant does not, the plaintiff is entitled to win, but if the defendant does offer enough evidence to meet the presumption, the persuasive burden of proving plagiarism is still on the plaintiff.

Quasi-Criminal Civil Cases

Wigmore presents *Speas* and *Overman* v. *Loesser* as if they were ordinary civil cases, implying that one would expect the burden of proof to split in ordinary legal proof. This is wrong. Splitting the burden is characteristic of proof of guilt. In ordinary legal proof, the burden characteristically shifts. The burden split in *Speas* and *Overman* v. *Loesser* because the cases were *quasi-criminal*. The defendant who loses a plagiarism case is not just found liable, but morally guilty of having stolen something. As I explained above, in a civil case, where one of the parties alleges that the other party has done something criminal or morally blameworthy, a third standard of proof is applied to that allegation.[101] Though this third standard of proof is generally described as being higher than the civil standard of proof and lower than the criminal standard of proof, it is abstract and thus, much more closely related to the criminal standard than the civil one. The same thing is true of the movement of the burden of proof. The presumption of innocence makes us reluctant to say that a person who is accused of doing something morally wrong has to establish his or her innocence. We are prepared to shift the

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[100] Id. at 522.

[101] See above, p. 18.

evidentiary burden of proof to the defendant, but not the persuasive or ultimate burden of proof.[102]

Wigmore's treatment of the splitting burden hides a very obvious pattern: it is usual for the burden of proof to split in criminal cases and shift in civil ones. It is very rare for the burden of proof to split in a civil case. This does happen occasionally, but when it happens, when the burden of proof splits in a civil case, the usual reason is that the case is perceived as *quasi-criminal*: civil in form, but criminal in nature. By citing only civil cases in connection with the splitting burden, the early editions of **Wigmore** suggest that one should expect the burden of proof to split in civil rather than criminal cases. The later editions of **Wigmore** do nothing to correct this mistaken impression. In the most recent edition of Wigmore, splitting the burden of proof is still discussed in terms of civil cases. Criminal cases are barely mentioned.

[102] *Speas* and *Overman* v. *Loesser* occur in the earliest editions of **Wigmore**. In **Appendix 3**, I discuss the other civil cases Wigmore uses in his early editions to illustrate splitting the burden. That discussion is helpful on the question of what an accusation of guilt is, but would take us away from the point here. In **Appendix 4**, I look in still more depth at another mistake in Wigmore's analysis of splitting the burden of proof.

This is the pattern

Ordinary proof	*Proof of Guilt*
two proofs compared against one another	*one proof judged against an external standard*
balance of the probabilities	*beyond a reasonable doubt* *clear and convincing evidence*
burden shifts	*burden splits*

criminal trials
civil trials

A great legal scholar misunderstood this pattern and taught us to misunderstand it.

Conclusion

I have discussed the cases cited in the early editions of **Wigmore on Evidence** because I think the early editions were responsible for creating the mistaken impression that it is *normal* for the burden of proof to split in a civil case. One consequence of this mistaken impression is that the burden of proof is sometimes *said* to split in a civil case, when in fact, the burden of proof did not split. An example of this is *Dunlop Holdings Ltd.*[103] An application for a patent for a tubeless tire wheel was being opposed by a firm that claimed it had manufactured and sold the tubeless tire wheels 14 years before the application for the patent was filed. The patent examiner denied the patent on the ground that the opponents had proven a prior use and sale of the invention.[104] The Patent Appeals Tribunal, in the person of a judge, reversed the examiner.[105] The English *Patents Act (1949)* provided that a person could oppose a patent application on the grounds of prior use, but that no account was to be taken of a secret use. The judge said the burden of proving that the use was not secret was on the party opposing the granting of the patent, and the evidence did not prove that the sale was not secret.

The English Court of Appeal reversed the reversal.[106] The Court of Appeal agreed with the judge in the Patent Appeals Tribunal that the ultimate burden of proving that the sale was not secret was on the party opposing the granting of the patent, but said that once the opponent led evidence of a sale, the burden on whether the sale was secret split and the evidentiary burden of proof shifted to the applicant. Since the applicant had offered no evidence of secrecy, the Court of Appeal said the applicant had failed to meet its evidentiary burden of proof.

The Court of Appeal discussed this case as though the evidentiary burden of proof had split, but there was no need for this analysis. The patent examiner did not decide the case on the basis that the applicant had failed to meet an evidentiary burden of proof that had split and shifted, but on the ground that the opponent had met the persuasive burden of proving the prior use. In weighing the evidence offered by the opponent, the patent examiner took into account that the evidence had been unopposed. The applicant had not even cross-examined the opponent's employees who had testified about the sale. The examiner said, "if a strong prima facie case for prior use is made out and there is no cross examination, the court is entitled to find it proved".[107]

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[103] [1979] R.P.C. 523 (P.O., P.A.T., C.A.) cited in Tapper, **Cross on Evidence**, (7th ed, Butterworths, London, 1990) p. 122.

[104] Id. at 525.

[105] Id. at 531.

[106] Id. at 537.

[107] Id. at 530.

This is not a split in the burden of proof; it is an application of the civil standard of proof. The cases for the two opposing parties were weighed *against* each other. The patent examiner looked at the two cases together and decided that the opponent had met its persuasive burden of proof. There was no need to treat the case as one in which the evidentiary burden of proof split, and in doing so, the Court of Appeal analyzed the case incorrectly.

Several things may have contributed to the Court of Appeal's incorrect analysis in *Dunlop*. In the first place, the case started as an administrative proceeding rather than a trial. The theory of proof is not as well developed outside of trials, and this alone may have made it hard for the Court of Appeal to analyze the case properly. But even if it had begun in court, *Dunlop* would have been a hard case to analyze properly. As the Court of Appeal admitted, it was never really clear who had the ultimate burden of proof. Buckley, L.J., after quoting a passage from a decision by Lord Denning, said,

> It is said that in that passage the Master of the Rolls assumed that the burden of establishing secrecy lay with those who asserted secrecy; on the other hand, Edmund Davies, L.J. seems to have taken a different view, for he expressed the opinion that the burden lay upon those who asserted non-secrecy.... There appears, however, to be no positive authority on the question of where the burden of proof lies.[108]

Dunlop was a hard case to analyze properly, but one reason the Court of Appeal analyzed it improperly is that it was taken for granted that there is nothing odd about splitting the burden of proof in an ordinary civil case. The Court of Appeal assumed that it had an analytical tool that it did not have, and said it was using that tool when it was not necessary to do so.[109] This assumption was fostered by Wigmore, who has had a tremendous influence on the thinking of lawyers and judges. This influence is most evident in the cases cited in the later editions of **Wigmore**. Nearly all of these cases cite earlier editions of **Wigmore** as authority for what the court does. Relying on **Wigmore**, courts have done what **Wigmore** says it is normal for courts to do. They have either split the burden of proof or talked as though the burden of proof could split in the ordinary civil case. Wigmore's view that it was normal for the burden of proof to split in a civil case has thus created evidence to support itself.

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[108] Id. at 542.

[109] It is worth noting that *Overman* v. *Loesser*, discussed above at p. 38-9, can be seen as a misanalysis like *Dunlop*. Technically, it was not necessary to discuss the split burden of proof in *Overman*. Loesser introduced evidence that he had written "On a Slow Boat to China" in November 1945. The trial court found that he done this and based its ruling in his favour on this finding. On appeal, the Ninth Circuit Court of Appeal said:

> The burden of proving plagiarism remained at all times on the plaintiff. The defendant fulfilled its duty of going forward by offering evidence of prior composition which if believed would make a finding of copying untenable. p. 523-4

But there was no need to talk or think about the effect Loesser's evidence would have had "*if* believed". Loesser's evidence *was* believed. The trial court found that Loesser wrote "On a Slow Boat to China" a year and a half before he had access to "Wonderful You".

The latest edition of **Wigmore** contains 40 pages discussing the evidence statutes in various American states.[110] These statutes, which carefully determine when the burden of proof splits in a civil case and when it shifts, all have comments citing Wigmore's discussion of the split burden of proof and all of them take it for granted that there is nothing abnormal about splitting the burden of proof in a civil case.[111] Even so, it should be noted that they only split the burden of proof in a very limited number of civil cases, many of which are documentary, and thus are part of the kind of proof I discuss in the next lecture, proof of a document.

[110] (Chadbourne rev. 1981) Vol. IX, p. 337-378.

[111] In his **Theories of Evidence** (see, Introduction, p. 1, n.1) Twining notes that great treatise writers like Wigmore can pull themselves up by their bootstraps (p. 111). I will not attempt to argue against all the law which has been developed relying on Wigmore's misleading analysis. Courts and legislatures can do whatever they want with the burden of proof. They can split it if they want to and shift it if they want to. I am not saying it is *improper* to split the burden of proof in a civil case, only that it is not the normal thing to do and that in general there is no reason to do it. In a civil case, if the burden of proof is going to move, the whole of it can shift and ordinarily, there is no reason why only part of it should shift.

Lecture III
Proof of a Document: Probate

Introduction

In Lecture II, I explained that proof of guilt is different from ordinary legal proof. It is different in two ways: one involves the standards of proof; the other involves splitting the burden of proof. Wigmore hid one of these differences by explaining the split burden of proof exclusively in terms of civil cases, thereby implying that it is typical or ordinary for the burden to split in civil cases. It is not. Splitting the burden is characteristic of proof of guilt and Wigmore failed to notice that most of the cases he cited as examples of splitting the burden, though civil in form, were quasi-criminal in nature. The burden split in them because 'guilt' was being proven.

Some of the civil cases used in the early editions of **Wigmore** to illustrate splitting the burden of proof do not fit this pattern, however. In those cases, the burden split, not because the case was quasi-criminal, but because the central fact in the case was the validity of a document.[112] *Proof of a document* is a third, distinct kind of legal proof. It crosses the features characteristic of the two other kinds of legal proof. In proof of a document, as in proof of guilt, the burden of proof often splits, but as in ordinary legal proof, the standard in proof of a document is comparative. The party who relies on the document has the burden of proving its validity only on the balance of the probabilities. An abstract standard is not typically used in document cases.[113]

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[112] One case used to illustrate splitting the burden in the early editions of Wigmore does not fit in either proof of guilt or proof of a document. *Wylie v. Marinofsky*, (1909) 201 Mass. 583, 88 N.E. 448, involves a different kind of formality. In *Wylie*, the plaintiff brought an action of replevin. Replevin, an ancient form of action which has been abolished in some jursidictions, (e.g. in Ontario, where the *Courts of Justice Act, 1984*, S.O. 1984, c. 11, s. 210 repeals the *Replevin Act*, R.S.O. 1980, c. 449) has a special character. It is a possessory action, in other words, it is not about ultimate title to the property (who owns it) but only about entitlement to possession (who has a right to have it). In *Wylie*, the plaintiff said she was entitled to possession of the property, a horse. The defendant said the plaintiff's husband had sold him the horse. The court held that the burden was on the defendant to raise the issue of the sale, but then, because replevin was a possessory action,

> the plaintiff must establish by a preponderance of credible evidence that he (sic) is at least entitled to the possession of the property in question.

The decision in *Wylie* turns on an obscure, ancient form of action. The distinction between the right to possession and title is no longer significant in law and the case has no general significance.

[113] A striking counter-example is *Barry v. Butlin*, (1838), 2 Moo. P.C. 480, 1 Curt. 637, 12 E.R. 1089, where it was held that if the opponent of a will offered evidence that the person who drafted the will was a major beneficiary under it, that was a "suspicious circumstance" and the proponent of the will had the burden of "clearing the conscience of the court". I do not discuss the "doctrine of suspicious circumstances" in this book. My comments on it can be found in my annotation of *Vout* v. *Hay*, at 7 E.T.R. (2d) 211 (1995).

Carver v. *Carver*, one of the cases cited in **Wigmore** since the earliest editions as an example of the burden splitting, is a document case.[114] In *Carver* a woman sued, claiming to be the rightful owner of certain land in the possession of the defendant. The defendant said the land belonged to the woman's husband and produced a deed signed by the husband and the woman. Ordinarily, the fact of a signed deed gives rise to a presumption that the property was transferred, but the woman claimed: 1) that she had not signed the deed, so the signature was a forgery; and 2) that if she had signed the deed, she had been induced to sign it by fraud, as she had been told the deed was really a mortgage she had to sign to keep her husband out of jail.[115]

In Indiana at this time a wife had a "dower" right to a one-third interest in her husband's property. If he made a deed of it, without her joining in the deed, the deed was invalid as to her one third. In *Carver*, the jury ruled that the woman was entitled to recover this third and the defendant appealed. The Supreme Court of Indiana upheld the trial decision. It said,

> It is conceded by appellants in argument, that Ira Carver, husband of appellee, was the owner of the land ... [and that] he made a deed for the same to the appellant William Carver. Their *whole claim* rests upon this deed from him. It is really conceded, too, ... that appellee, as the widow of Ira Carver, ... if she did not join in that deed, is the owner of and entitled to the possession of the undivided one-third of the said real estate... It is contended, however, that she did not join in that deed. Whether she did or not, is *the main question of fact* in the cause. (emphasis added)[116]

When a party's "whole claim" rests upon a document so that the "main question of fact" in the case is the document's validity, a special kind of legal proof is used. The split burden is characteristic of this kind of legal proof, and in *Carver*, the burden split. At common law, the rule was that a party who produced a deed had to prove its execution, but a statute in Indiana had relieved "the party relying upon a written instrument of the burden of making proof of its execution, *unless the execution be denied under oath*."[117] The court put the result this way:

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[114] (1884) 97 Ind. 497, cited in Wigmore's 1st ed. at Vol. IV, sec. 2489, n. 2, p. 3532.

[115] The woman also claimed that the property was hers, not her husband's, that it had been mistakenly put in his name, but this claim was abandoned at trial.

[116] (1884) 97 Ind. 497, 507-8.

[117] Id. at 510 (emphasis added).

Proof of a document is a third kind of legal proof. When a document is proven the burden of proof often splits but an abstract standard is not usually used.

> After making a *prima face* case in favor of the execution of the writing, it may be read in evidence. The party making such proof may rely upon it, and in the absence of countervailing evidence, it will be sufficient to make his case. This however, does not shift the burden of the issue to the party denying the execution.... When the execution is ... denied, the question is did the party thus denying in fact execute it? The party relying upon it has the affirmative of that issue. The burden is upon him to establish that affirmative, and the burden will remain upon him until he establishes it to the satisfaction of the jury....[118]

This is splitting the burden. At the start of a trial turning on the validity of a document, the party who propounds the document[119] has the unified evidentiary and persuasive burden of proving its validity. The evidentiary part of the burden means the party who relies on the document must present it to the court.[120] In the old language of the law, a party who relies on a document must "make profert" of it, for as Lord Coke said in *Doctor Leyfeld's Case*,

> It appears that it is dangerous to suffer any one who by law in pleading ought to show the deed itself to the court, upon the general issue to prove in evidence to the jury by witnesses that there was such a deed, which they have heard and read; or to prove it by copy; for the viciousness, rasures, or interlineations, or other imperfections in these cases, will not appear to the court ….[121]

This burden of making profert is *purely formal.* If a document is presented to a court in proper form,[122] the law accords it presumptive validity. This is done for deeds, negotiable instruments,[123] and (pre-eminently) wills.[124] The presumption of documentary

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[118] Id. at 510-1.

[119] *Carver* is especially interesting because, when the burden of proof split, it moved, not *to* the defendant, as it usually does, but *from* the defendant. I am not sure of this, but my impression is that documents are more likely to be part of a claim than part of a defence.

[120] I discuss the probate of a non-existant will below at p. 71.

[121] (1611) 10 Co. Rep. At f. 92b, cited in the discussion of the doctrine of profert in W. Holdwsworth, **A History of English Law**, (London, 1926) Vol IX, p. 170. Holdsworth points out that in medieval law documents were thought of as proof, not evidence. They served the same function as an oath or an ordeal. I will return to this question in Lecture IV below.

[122] Obviously, a will drafted on the back of a grocery receipt would not be accorded presumptive validity.

[123] Notice that it is *not* done for contracts. A contract is a document to which proof of documents does not apply. Contracts are matters of ordinary legal proof. This is because the question in a contract action is usually about the legal effect of the contract (its meaning or what it covers), rather than its validity. The legal effect of a deed or a negotiable instrument is usually not at issue and if the legal effect of a will (its meaning) is at issue, that is dealt with in a proceeding called "construction", which is different from probate.

validity means that when the party relying on the document has satisfied the evidentiary

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That negotiable instruments are different from ordinary contracts, especially as regards proof, is stressed throughout *Marvco Colour Research Ltd.* v. *Harris* [1982] 2 S.C.R. 774, 141 D.L.R. (3d) 577, 45 N.R. 302, 20 B.L.R. 143, 26 R.P.R. 48.

Bills of exchange and promissory notes are negotiable instruments. *Ginn* v. *Dolan*, (1909) 81 Ohio 121, 90 N.E. 141, one of the cases cited in the second edition of **Wigmore on Evidence** involves a promissory note.

> With a negotiable instrument, one person holds a document which says something like:
> The undersigned agrees to pay so much and so much money to the bearer of this note on such and such a date.

If the person who signed the note refuses to pay, the person who holds the note may sue. This is a contract action and in a contract action, the plaintiff normally has the burden of proving consideration. A contract for which there is no consideration is not "valid or enforceable unless it is made under seal". Falconbridge, **The Law of Negotiable Instruments in Canada** (10th ed. Ryerson, Toronto, 1955) p. 126.

> Where the contract involved is a negotiable instrument, however, consideration is presumed. If a party to an instrument is sued upon it, it is presumed in the first instance in favour of the plaintiff and against the defendant that the latter became a party for valuable consideration, but if the defendant gives evidence that he received no value, the burden is shifted to the plaintiff to prove that he is a holder for value. Id. at 128.

Money is also a negotiable instrument. What money is beside a piece of paper is very hard to say. One theory is that: "only those chattels are money to which such a character has been attributed by law, i.e. by or with the authority of the state." F.A. Mann, **The Legal Aspect of Money**, (Oxford, 1938) p. 10. Mann points out that there was a time when it had to be settled that paper was money. *Millar v. Race* (1758), 1 Burr. 452 (per Lord Mansfield), cited in Mann at p. 9, n. 3. A presumption akin to the presumption of 'documentary' validity once applied to coins and other "hard", i.e. non-paper, symbols.

[124] A point to note is that the documents I discuss are all created by *private* individuals. The law also accords presumptive validity to *state-created* documents, like licenses, birth, marriage and death certificates. Indeed, as I point out in Lecture V, the law makes a certificate of registered title "conclusive evidence" of ownership, p. 132. In n. 24, I noted that private documents like contracts are written to keep the parties from fighting and that public documents like treaties and constitutions serve the same function. Licenses and certificates also serve this function, but in a slightly different way. They make proof of certain facts so easy that litigation about them almost never occurs.

Other documents on which the law must rely are also given presumptive validity and statutes may split the burden of proof on them too. Thus, the *Canada Evidence Act*, R.S.C. 1985, c. C-5, s. 26 (3) provides that where the law requires that a "request for information, notice or demand" be sent by mail, an affidavit that the request, notice or demand was sent by registered mail with a copy of the registered mail receipt shall, in the absence of evidence to the contrary, be proof of the sending and of the request, notice or demand. And the B.C. *Evidence Act* R.S.B.C. 1996, c. 124, s. 41 provides that where it would be necessary to produce and prove an original document that has been filed in a land title office, a copy can be introduced as proof, if the party introducing it gives 10 days notice, unless the party receiving the notice gives 4 days notice that he disputes the validity of the document. Each of these is a split burden of proof.

It is hard to say which is more important in law, publicly or privately created documents, but when publicly created, i.e. official documents are the centre of a law suit, the question at issue is not generally their validity, but their applicability and interpretation. This, of course, is a question of law, not fact, particularly when the publicly created, official document in question is a statute or a judicial opinion.

Proof of a document is very formal.

Documents are extraordinary devices that throw legal proof into an ecstatic tizzy.

burden, it has normally satisfied the persuasive burden as well. The document will be found to be valid, unless the party challenging the document presents evidence that calls its validity into question (for instance, evidence that the person who made the document was forced to do so).

That the party challenging a document must present evidence calling it into question means the burden of proof has split.[125] The evidentiary burden has moved from the party propounding the document to the party opposing it. The persuasive burden, however, remains where it was.[126] If the evidentiary burden is met, if the party opposing the document succeeds in calling its validity into question, the party relying on the document must establish its validity on a balance of the probabilities.

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[125] The burden of proof is split by the presumption of documentary validity and the presumption of innocence. These two presumptions are quite different, but they are related. This can be seen quite clearly in the standard of proof associated with the equitable doctrine of rectification. Because documents are so important, a party who questions the contents of a document and seeks judicial rectification of it, must prove that the document did not reflect the true agreement by what was once referred to as "strong irrefragible evidence". *Countess of Shelbourne* v. *Earl of Inchiquin* (1784) 1 Bro. C.C. 338, 341, 28 E.R. 1166. This was restated in modern times as "something more than the highest degree of probability". *Fowler* v. *Fowler* (1859) 4 DeG & J. 250, 265 45 E.R. 97 and *Coderre (Wright)* v. *Coderre*, ([1975] 2 W.W.R. 193, 196. The Alberta Supreme Court said this:

> The authorities are very clear as to the proof necessary to enable the court to grant recitification of a written instrument on the ground of mutual mistake. There has been injected into such civil procedings, the standard of proof required in criminal procedings, so that the court must be satisfied beyond a reasonable doubt not only that a mutual mistake was made but as to the agreement which would have been made by the parties had no such mistake occurred. *Shorb* v. *Public Trustee* (1953), 8 W.W.R. (N.S.) 657, 664, affirmed 11 W.W.R. (N.S.) 132 (Alta. C.A.) (emphasis added)

The Supreme Court of Canada also talks about rectification in terms of "proof beyond a reasonable doubt". *The "M.F. Whalen"* v. *Ponte Anne Quarries Ltd.* (1921), 63 S.C.R. 109, 126-7, 63 D.L.R. 545 (per Duff J.), affirmed [1923] 1 D.L.R. 45 (P.C.)

For a court to say that the standard of proof in a civil case is proof "beyond a reasonable doubt" shows the close relationship between the presumption of documentary validity and the presumption of innocence.

[126] We commonly express the fact that burden of proof splits in a document case by saying the persuasive burden "remains" with the proponent throughout. This language is a bit misleading. It is carried over from proof of guilt, where the presumption of innocence compels us to insist that, even when the evidentiary burden moves to the defendant, the persuasive burden of proving guilt beyond a reasonable doubt must *remain* with the prosecution.

In proof of guilt, to speak of the presuasive burden as "remaining" with the prosecution makes sense because the prosecution typically has a number of facts to prove and on some of them the burden will not have split. Because we commonly ignore the fact that there is a burden of proof on each fact in issue and speak of the overall burden of proof, it makes sense to say the persuasive burden "remains" with the prosecution. In a documentary case, however, there is only one issue. To say the persuasive burden "remains" on the proponent of the document while the evidentiary burden is on the opponent impies that the persuasive burden has somehow been "temporarily suspended". This is not possible. Burden of proof is merely a metaphor. It expresses a definite procedural consequence: if the party with a burden fails to meet it, that party loses the action. It makes no sense to speak of this consequence as "temporarily suspended".

Proof of a document is akin to proof of guilt because the burden characteristically splits, but it is different from proof of guilt because the standard for the persuasive burden is typically a balance of the probabilities. Proof of a document is unlike both ordinary legal proof and proof of guilt because it mixes these two characteristics and also because it is *peculiarly formalistic*. In probate this has a very dramatic linguistic form. If the evidentiary burden of calling a will into question is not met, the will receives what is called "probate in *common form*". If the evidentiary burden is met, so the validity of the will must actually be proven, this is called probate "in *solemn form*".

Formalism

All law is formalistic. All law generalizes. It is the nature of rules to say *every* such-and-so will be treated in such-and-such a way.

> No legal system can be entirely free of form; it is central to the very idea of law. A society with no established means for effecting one's will, with no guarantee that given circumstances will produce known results, and that authorities will intervene in a predictable manner to sanction and protect one's expectations, is a lawless society. Form carries with it connotations of consistency, universality of treatment, and protection against arbitrariness and discretion. It promotes certainty through measures of standardization, and certainty is at the core of our intuitive notion of law.[127]

Courts sometimes adopt an attitude of formalism in order to make their decisions *seem* certain. In *Foskett* v. *McKeown*,[128] for instance, the House of Lords went out of its way to be formalistic about a question of property. A man in England ran a business buying property in Portugal for other people. They sent him money in trust, which he used to buy property for them. The man stole money from the trust account and used it, among other things, to make two payments on a life insurance policy in favour of his children. He then killed himself.

Under the policy, even if the man committed suicide his children were to recover, so the insurance company duly paid £1 million over to a trustee. At this point, the people

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[127] C. Wasserstein Fassberg, *Form and Formalism: A Case Study*, (1983) 31 Am. J. Comp. L. 627, 628. This is a very interesting discussion. I agree with Fassberg's distinction between form and formalism, but disagree with her about whether formalism is appropriate in the modern law of wills. Formalism is not appropriate in other areas. In wills, I think, it is appropriate. She does not.

Wasserstein Fassberg's article opens with a marvelous quotation from Vinogradoff, **An Introduction to Historical Jurisprudence**, Vol.1, p. 364 (1920). In early Germanic law, Vinogradoff says,

> transfers of land had to be performed in the presence of a certain number of small boys who, after the ceremony, were treated to a box on the ear, in order that they might keep a vivid remembrance of what happened.

The effectiveness of this procedure depended, of course, on the boys not getting their ears boxed for no reason.

[128] [2000] 2 W.L.R. 1299.

who had sent the man the money to buy the property in Portugal sued. They said the man was a trustee of the money they had sent him and if a trustee uses trust property to acquire *other* property, that property becomes *part* of the trust. Since two out of the five payments the man had made on the life insurance policy were paid for with money taken from the trust, 2/5 of the policy, and hence 2/5 of any insurance proceeds, belonged to them.

The trial judge ruled for the people who had sent the man the money to buy land in Portugal. He said they were entitled to £400,000. The Court of Appeal reversed. It said the people who had sent the man the money were entitled to recover the money the man had stolen (plus interest, of course), but they did not become part-owners of the insurance policy. The House of Lords reversed and restored the trial order. Lord Browne-Wilkinson went out of his way to explain this result formalistically:

> The crucial factor in this case is to appreciate that the purchasers are claiming a *proprietary* interest in the policy moneys and that such *proprietary* interest is not dependent on any discretion vested in the court. …
>
> If, as result of tracing, it can be said that certain of the policy moneys are what now represent part of the assets subject to the trust…, then as a matter of English property law the purchasers have an absolute interest in such moneys.… There is no room for any consideration whether, in the circumstances of this particular case, it is in a moral sense "equitable" for the purchasers to be so entitled.… This case does not depend on whether it is fair, just and reasonable to give the purchasers an interest as a result of which the court in its discretion provides a remedy. It is a case of *hard-nosed property rights*. (emphasis added)[129]

It is highly unusual for a court to speak of some legal rights as "hard-nosed"[130] because this seems to imply that other legal rights might be "soft-nosed". This, at the very least, would be problematic for law.[131] More important, if rights are really "hard-nosed" they should be visible to *every* judge. In this case, the Court of Appeal could not see them, nor could the two Law Lords who dissented.

Hard-nosed legal rights *should* be visible to *everyone in the society*, and truly hard hard-nosed rights *are* visible to everyone. The rights of a homeowner against squatters, for instance, are visible *even to the squatters*. They know the owner has a legal right to have them thrown out. They don't like this morally or politically and hope it won't

[129] Id. at 1305.

[130] To speak of "hard-nosed property rights" is to to raise "propietary" to a very high level on the relative scale of rights. The word "constitutional" works this way in the US and Canada. Lord Browne-Wilkinson's comment is very like the comment in *Robertson* v. *Fleming* (1861) 4 Macq, 167, 177, quoted below at n. 226.

[131] For a discussion of why, see above, n. 50.

happen, but they know *legally* it could. In *McPhail* v. *Persons Unknown*,[132] for instance, Lord Denning said the squatters "admit that they had no defence in law. … [T]hey ask the court to give them time. They only asked for four weeks, or so." Lord Denning felt he had to refuse this request:

> When the owner of a house comes to the court and asks for an order to recover possession against squatters, the court must give him the order he asks. It has no discretion to suspend the order. But whilst this is the law, I trust that owners will act with consideration and kindness in the enforcing of it – remembering the plight which the homeless are in.[133]

This is true formalism. Denning's plea to the owners is not just *obiter*, it isn't even law. It has nothing to do with law. It is a *totally extra-legal* plea. In *Borough of Southwark* v. *Williams*, Lord Denning said,

> [T]he courts must, for the sake of law and order, take a firm stand. They must refuse to admit the plea of necessity to the hungry and homeless; and trust that their distress will be relieved by the charitable and the good. … [The squatters] must make their appeal for help to others, not to us. They must appeal to the council, who will, I am sure, do all it can. They can go to the Minister, if need be. But, so far as these courts are concerned, we must, in the interests of law and order itself, uphold the title to these properties. [134]

Here we have a right that really is not subject to judicial discretion – a "hard-nosed property right" in Lord Browne Wilkinson's words – and the important thing to notice about such a right is how *rare* it is. Law is technical, but courts are rarely formalistic in the sense that *nothing* can trump the legal rules. A trial is almost never so clear that what is fair, just and equitable has *no* consequence. Most law is not formalistic in this sense.

Proof of documents is! That is the point of this lecture. Where documents are concerned, formalism is not rare. Formalistic is the *usual* way for courts to be when they consider documents. The explanation for this lies at least partly in the *nature* of a document.[135]

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[132] [1973] 3 W.L.R. 71, 74 (C.A.)

[133] Id. at 78.

[134] [1971] 2 All E.R. 175, 179-80.

[135] In *Foskett v. McKeown* and the cases on squatters, the question being decided was a legal one rather than a factual one. I discuss the difference between questions of law and questions of fact in Lecture VI, p 146. This distinction is important but the degree of formalism in an area of law is the same on questions of law and questions of fact.

Documents

The physicalness of documents makes them special, and we should not forget that when documents were less common, they were so special they were thought to have magic power. The Venerable Bede, an English monk writing in the 8th century, described their use in an Irish remedy for poison. The pages of a manuscript were "scraped" he said,

> and the scrapings put in water and given to the sufferer to drink. These scrapings at once absorbed the whole violence of the spreading poison and assuaged the swelling.[136]

Nor was the power of writing always seen as quite so unequivocally positive. When the Normans conquered England in 1066, King William had all the legal rights of the Anglo-Saxons investigated and inscribed in Domesday Book.

> In a well known passage the *Anglo-Saxon Chronicle* says that King William had the investigation made so narrowly 'that there was no single hide nor hair nor virgate of land, nor indeed – it is a shame to relate but it seemed no shame to him to do it – one ox or one cow nor one pig which was there left out and not put down in his record.' This description obviously exaggerates in order to emphasize the frightening – and shameful – thoroughness of the Domesday survey. Similarly Fritz Neal explained a century later that the book had been called *Domesdei* 'by the natives' because it seemed to them like the Last Judgment described in Revelation.[137]

The fact that documents are physical is very influential in making proof of them peculiarly formalistic, but it is not the only factor. When historians speak of "documents" they are not necessarily talking about writing. Photographs can be historical "documents" as can taped speeches and old TV shows. Sociologists go even further. Harold Garfinkel describes an experiment in which a supposed "counselor" gave subjects oral "advice" in the form of yes/no answers to a series of questions. Actually, the answers were randomly pre-determined, so that each subject received the answer "yes" to questions 1,2,4,6,7, etc. and "no" to questions 3,5,6 etc. Garfinkel says the subjects treated these answers "as documents"; i.e., they sought to "understand" them, "interpret" them and gather their "meaning".[138]

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[136] Quoted in J.M. O'Toole, *"Commendatory Letters": An Archival Reading of the Venerable Bede*, (1998) 61 The American Archivist 266, 279. In this passage, Bede is clearly speaking tongue-in-cheek about Ireland. It is not clear how he means the reference to manuscript scrapings.

[137] M.T. Clanchy, **From Memory to Written Record** (Harvard, 1979) p. 18.

[138] *Common Sense Knowledge of Social Structures: The Documentary Method of Interpretation in Lay and Professional Fact Finding*, in **Studies in Ethnomethodology** (Prentice Hall, 1967) p. 76-103. The title of this piece makes it sound like something every lawyer should read. It is not. I was lucky to have this piece explained to me before I read it, or I would not have understood anything in it. My discussion relies more

This sociological idea of a "document" is quite different from the legal idea of a "document". It is instructive, however, because it leads one to think of a document as *any* organization of materials, any index or ordering with an *apparent* meaning and purpose. In this sense, an alphabet is a "document", and if we notice the nature of an "alphabetical proof", we can see why proof of a document is so formalistic. If one knows how to spell a word, the fact that it is absent from a dictionary can be quickly and conclusively established, simply by pointing to the place where it ought to be.[139]

This, of course, is proof *by* a document, not proof *of* a document, but formalism is part of the *use* of documents. To "document" something is to "prove" it, and "documentation" is "proof" … but only if the document is *valid*. Legally, an invalid document is *nothing*: a mere piece of paper with writing on it. It may be evidence of fraud, but it has no other legal consequence.

In *Foskett* v. *McKeown*, Lord Browne-Wilkinson tried to use "proprietary" as if it meant "documentary". "Document" is a legal term, as is "property", but the term "property" can be applied to many different factual circumstances,[140] and since property is a "bundle of rights", which may or may not include a *particular* right,[141] labeling something "property" does not end the matter. Property is a constructed category. Documents are not. They are a *physical* form. Up until quite recently it might have seemed almost silly to mention the fact that documents are written on paper, but the spread of computer technology and the difficulty law is experiencing in dealing with "e-documents" has suddenly made the physical nature of paper documents extremely apparent.

All legal categories are generalizations, but documents have a generalization built into them in a way that other legal facts do not. The form of a document is spelled out in advance. Each type of document has a particular name, and documents often bear their names on their face. A will normally says it is a "will". A deed says it is a "deed". Other legal facts do not come labeled in this way. Torts do not announce themselves as torts, and though property law is sometimes formalistic, even property does not typically come labeled "property". A court must decide whether something is property and if it is property, which property rights attach to it.

Documents are not like this. A court must decide whether a document is valid, but not what a document is or what legal effect it has. A valid document has certain legal effects, and those are spelled out in advance. An invalid document has no legal effect. It

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on the explanation than the piece itself. The sociological idea of a document is also discussed in Karl Mannheim, *On the Interepretation of Weltanschauung* in **Essays on the Sociology of Knowledge** (Collected Works, Vol 5, 1952).

[139] The same is true of numbers and the metric system.

[140] Consider, for instance, *Moore v. The Regents of the University of California*, in which a man's spleen was held not to belong to him, 51 Cal. 3d 120, 793 P.2d 477 (1991, S.C.).

[141] See *Delgamuukw* v. *British Columbia* [1997] 3 S.C.R. 1010, 153 D.L.R. (4th) 193, discussed at p. 149.

is a nullity. A document is supposed to look a certain way. It is supposed to be created in a certain way and it is supposed to contain certain things. Proving a document contains what it is supposed to contain and was created in the right way is bound to be more formalistic than proving anything else, if only because we know *exactly* what we are looking for.

Proof of a Will
The Technical Nature of Succession Law

The purest example of the proof of a document is "probate", which literally means "proof" of a will. The law of succession is one of the most technical and formalistic areas in the law.[142] The proof of all documents is formalistic, but the proof of a will is particularly formalistic. In part this is because the motivation for making a will is different from the motivation for making other documents. People normally make deeds and negotiable instruments in *exchange* for something.[143] Wills are not generally part of an exchange. The only thing one gets from making a will is peace of mind, a feeling of security about what will happen to one's property after one is dead.[144] Wills allow people

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[142] Prof. A.J. McClean of the UBC Law Faculty points out that my teaching Succession Law in British Columbia has influenced my views on the formalism in the law of wills. B.C. is one of the most formalistic jurisdictions as regards wills. Other jurisdictions have modified their law to make it less formalistic. Even in those less formalistic jurisdictions, I would venture to suggest that wills are still treated more formalistically than most things.

The three most formalistic areas of law are wills, crimes and tax. Criminal law is highly formalistic because of the presumption of innocence. No one can be found guilty of an "inferential" or common law crime. The Nuremberg trials are a counter-example which proves this rule. Crimes must be spelled out in advance, in detail, and all the facts must be proven beyond a reasonable doubt. Proof of guilt, therefore, characteristically requires proof of tiny little facts to a very high standard. If, for instance, the owner of credit card is not called to testify that the person who took the card and used it did not have permission to do so, the accused must be acquitted.

Tax law is highly formalistic, too. This is partly because of a presumption analogous to the presumption of innocence. Just as as a criminal cannot be found guilty of a crime which has not been spelled out in exact detail in advance, so a citizen may not be taxed unless the government levies the tax in exact detail in advance. "[I]f the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparantly within the spirit of the law the case might otherwise appear to be." *Partington* v. *A.G.* (1869-70), L.R. 4 H.L. 100, 122. The use of "subject" and "free"reveals one reason why tax law is formalistic. It is also formalistic because the facts to be proven are numerical and numerical proof is inherently formalistic. Numbers are a classic form, see, n. 133.

[143] One person might give another something in exchange for a promise that when the second person dies, the first will receive something. If this agreement is written down, one question that may occur in probate is whether the document recording the agreement is a will or a contract. If the document is a will, to be effective, it must be executed with the special formalities required for the execution of a will. If it is a contract, much less formality is required. *Bird v. Perpetual Executors* (1946) 73 C.L.R. 140 (H.C. Aust.) discusses what makes a document "testamentary".

[144] People often say wills serve another purpose, namely, they give people control over how they will be treated in their old age. As Bentham says in the **Rationale of Judicial Evidence** (London, 1827) Vol. II, Book IV, Ch. V. p. 516.

> In the hands of the aged, it serves as a compensation for the various disgusts which that time of life is so liable to inspire; and as a security against that neglect and contempt to which, on that account, as well as on the account of the weakness incident to it, they

to believe that even though they will not be there to see it, the law will make their wishes come true.

If people did not have a very, very high degree of confidence in the law of succession, it would serve *no* purpose at all. It would accomplish *nothing*. A will is, in essence, a contract between a testator and the law. The law of succession *must* yield extremely reliable results. In this area, certainty *must* trump justice and good sense, or to put the matter more congenially, in the law of wills, certainty *is* justice and good sense. This is the ideology of succession law.[145] The law of succession does not apologize for being technical and formalistic. The law of succession *glories* in being technical and formalistic. Its self-expressed goal is to be completely rule-governed, and thus to eliminate all debatable 'policy' issues about justice, utility and values.[146]

Another reason for this attitude is practical. When a will is proven, the best evidence of its validity is *necessarily* unavailable. If a deed or negotiable instrument becomes the subject of a dispute, the maker of the document is often available to give evidence. A testator is *never* available to give evidence when his or her will is offered for probate.[147] The maker of a will is always dead when the will is proven.[148] This simple

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> would otherwise stand exposed. … In the hands of a person rendered helpless by disease, and dependent for his life on the services of others, [the power to make a will] is a security for life, and instrument of self-preservation.

Wills serve this function becaue they are "ambulatory". Ambulatory means they do not become operative until the testator dies, or loses testamentary capacity (on which see below). It also means they apply to property acquired by the testator after the will is made. A person's estate is reckoned at the time of death, not the time a will is executed.

[145] It is as clear as the ideology in the presumption of innocence and is a moral ideology if you think doing what people want is a matter of morals.

[146] Fassberg, op cit supra n. 127, at p. 643, quotes an Israeli statute which goes squarely against this ideology: s. 25 of the *Succession La*w.

> Where the Court has no doubt as to the genuineness of a will, it may grant probate thereof notwithstanding any defect with regard to the signature of the testator or of the witnesses, the date of the will, the procedures set out in sections 20 and 23 [as to formal execution], or the capacity of witnesses.

Fassberg says this statute "appears to be unique" and it certainly runs against the general trend. Statutes do not grant discretion when it comes to probate. Fassberg discusses the Continental European Civil Law on this point and it parallels Common Law. The statutes of British Columbia, from which I will take the statutory illustrations in this lecture, do grant some very broad discretion to the courts, but *not in probate*. The B.C. *Estate Administration Act*, R.S.B.C. 1996, C. 122, s.98 for instance, grants the courts a wide "policy" discretion to make provision for common-law spouses and separated spouses *on an intestacy* and the B.C. *Wills Variation Act*, R.S.B.C. 1996, c. 490, s. 2 grants a broad "policy" discretion to *vary a will* when "inadequate" provision is made for a spouse or children.

[147] Notice also that no one but a *natural* person may make a will.

[148] Two (or more people) can execute a joint will, that is, a single document, typically speaking in terms of "we", which operates as the will of each party when that party dies. The maker of a joint will may be available to give evidence when it is offered for probate at the death of the other maker.

practical constraint makes proof of a will necessarily formalistic and so does the history of the law of wills.

A Very Brief History[149]

Before 1540, the law of succession in England consisted of rules that had evolved from earlier tribal and local customs. No legislation regulated the manner in which wills were made. Courts of chancery, ecclesiastical courts and common law courts not only exercised competing jurisdictions, they also applied different legal rules.[150] In 1540, the *Statute of Wills* introduced mandatory formalities into the law for the first time. It required that a will disposing of real property be in writing, but it did not require that it be signed.

The modern law of wills starts with the *Statute of Frauds, 1677*. This statute was passed, we should remember, less than 20 years after one of the most turbulent periods in British history. From 1642 to 1651 there had been a civil war in Britain. On January 30, 1649, Charles I was deposed and beheaded. For the next 11 years the Puritans, under Oliver Cromwell, ruled as the Commonwealth and then, in 1660, Charles II was restored to the throne. The *Statute of Frauds, 1677* was designed to bring some stability back into the law. It required formalities in various kinds of document and introduced requirements to govern the form of a will disposing of land.[151] It provided in part,

> … all devises … shall be in writing, and signed by the party so devising the same, or by some other person, in his presence and by his express directions, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else shall be utterly void and of none effect.[152]

During the period between the enactment of the *Statute of Frauds* and the early part of the 19th century, complex rules developed respecting the form and execution of

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[149] I have taken large segments of this section verbatim from a 1981 Report on *The Making and Revocation of Wills*, published by the Law Reform Commission of British Columbia. Its successor, the BC Law Institute, has graciously given me permission to use this material without quoting it.

[150] In fact, under English law, testators have not always enjoyed untrammelled testatmentary freedom. During the 12 and 13th centuries, the law required that the estate of a deceased person be divided into three parts. One third of the estate was reserved for the widow and one third for the children. Only the remaining third could be disposed of by will, usually for pious or charitable purposes. Making a will eventually became common for those who could afford to do so and intestacy came to be regarded as disgraceful. Since wills were usually written by priests, dying without one implied that the deceased was unshriven, i.e. without final confession.

[151] The statute did not require that a will disposing of personalty be in writing. Such wills were usually reduced to writing, however, because there were stringent formalities required to validate oral wills disposing of a value over 30 pounds.

[152] Imagine a modern statute saying "three or four witnesses". In **Appendix 7**, I discuss a modern case in which a court speaks of a letter which should have been mailed "by the 30th, or at the latest, the 31st".

wills. There were nominally six types of will, the classification of which depended on the nature of the asset devised or bequeathed. Within each class, sub-rules were formulated, further confusing the law. As a result of the complex and uncertain nature of these rules, frequent litigation was inevitable. The situation was exacerbated by the development of complex rules concerning the construction of language in wills. Ultimately, lawsuits over wills became the most frequent source of real property litigation, and it was estimated that ownership of four fifths of the land in England was in dispute.

In 1833 the Real Property Commissioners in England examined the law governing the making of wills and made sweeping and radical proposals for reform. They concluded that all wills were to be executed in one simple form, easily understood and applied. The recommendations of the Real Property Commissioners were implemented by the *Wills Act, 1837*. The formalities required for a valid will were specified in one section of this *Act*. They have been in effect ever since in England, and have served as the model for the wills legislation of most Common Law jurisdictions.

The Formalities of Execution

To be valid,

1) a will must be in writing;

2) it must be signed at its "foot or end" by the testator;[153]

3) there must be at least two witnesses;

4) the testator must sign the will or acknowledge his or her signature in the joint presence of the two witnesses; and

5) the witnesses must then sign the will in the testator's presence, though not necessarily in each other's presence.[154]

The formalities required for the execution of a will are elaborate, but in one regard at least, the formalities for making an affidavit are even more stringent. Everywhere in the Common Law world, an affidavit may be defined as "an oath in writing signed by the party deposing, sworn before and attested by one who has authority to administer the same".[155] The witnesses to a will do not need to be officially appointed. A testator can select his or her own witnesses. There is not even a requirement that they be "of age". People who could not legally make a valid will can witness one, and while

[153] Or by someone signing in his or her name, at his or her request and in his or her presence.

[154] In B.C., they are in s. 3 and 4 of the *Wills Act*, R.S.B.C. 1996, ch. 489. S. 4 is subject to s. 5, which provides less strict formalities for "privileged wills", i.e. wills made by sailors and soldiers on active duty.

[155] 1 **Bacon's Abridgement** 124 (7th ed, 1832).

there must be *two* witnesses to make a valid will, this is not unique to wills. In British Columbia, for instance,

1) a person may consent to the use of his or her body after death in writing at any time or "orally in the presence of two witnesses during the person's last illness";[156]

2) a representation agreement specifying who shall make decisions if a person becomes incapable of making decisions independently must be signed by the person, the representative and each alternative representative, and while they need not be "present together" when they execute the representation agreement, "each of them must execute the agreement in the presence of two witnesses";[157]

3) evidence taken by a land surveyor must be reduced to writing, read over to the person giving it and signed by that person, unless that person cannot write, in which case, "the person must acknowledge it as correct before 2 witnesses who must sign it along with" the surveyor;[158]

4) a member of the Legislative Assembly who wishes to resign may do so by declaring this in the Assembly or by delivering to the Speaker "a resignation signed by the member and attested by 2 witnesses;[159]

5) a marriage solemnized by a religious representative must be solemnized "in the presence of 2 witnesses beside the religious representative.[160]

This sample shows that what is distinctive about the formalities for executing a will is not the requirement that there be *two* witnesses, but that the testator must make or acknowledge his or her signature in the *joint presence* of the two witnesses. The rationale for this requirement was set out in the 1833 Report of the Real Property Commissioners:

> The presence of witnesses is required in order to prevent fraud or coercion, and to prove the capacity of the testator; the number two was fixed on instead of one, in order to increase the chance that a witness would be living at the death of the testator, and in order to bring into play the difficulty of engaging an accomplice, the necessity of rewarding him, and the danger to be apprehended from his giving information; the two

[156] *Human Tissue Gift Act*, R.S.B.C. 1996, ch 211, s. 4(1)(b).

[157] *Representation Agreement Act*, R.S.B.C. 1996, ch. 405, s. 13(3).

[158] *Land Survey Act*, R.S.B.C. 1996, ch. 247, s. 10(2).

[159] *Constitution Act*, R.S.B.C. 1996, ch. 66, s. 33(1)(b).

[160] *Marriage Act*, R.S.B.C. 1996, ch. 282, s. 9(1).

> witnesses are required to be present together, in order to remove the possibility of getting two accomplices at different times, and in order to force them to tell exactly the same story in Court, and thus to render perjury more easily discoverable by cross-examination.[161]

For a will to be valid, the testator must sign it in the joint presence of two witnesses, or acknowledge his or her signature in the joint presence of two witnesses. After that, the witnesses must sign in the presence of the testator. This rule is applied very technically, for instance, if a testator signs in the presence of *one* witness who then signs the will and then the testator acknowledges the will later in the presence of *another* witness, who thereafter signs the will, the will is invalid. In *Re Brown*,

> while the testatrix, Anna Kingsmill Brown, and her nurse, Mrs. Elizabeth Viccars, were in an upper room, the testatrix wrote out her will in longhand and signed it in the presence of Mrs. Viccars, who in turn subscribed her name thereto as a witness in the presence of the testatrix.
>
> The testatrix and Mrs. Viccars then walked downstairs and entered a lower room, where they were joined by a Mrs. Edith Moon, who had not been present in the upper room when the testatrix signed her will and Mrs. Moon subscribed her name as a witness. The testatrix told Mrs. Moon that she had made a will and asked her to sign as a witness. For the benefit of Mrs. Moon the testatrix acknowledged her own signature on the will and Mrs. Viccars identified her signature thereon as a witness. Mrs. Moon then subscribed her name to the will as the second witness, in the presence of the testatrix and Mrs. Viccars.[162]

The court held the will invalid:

> … since the testatrix did not sign her will in the presence of Mrs. Viccars and Mrs. Moon, both actually present at the same time, it was not only necessary for her to acknowledge her signature in the presence of both of them, present at the same time, but it was also necessary for both Mrs. Viccars and Mrs. Moon to subscribe their names as witnesses to the will after the testatrix had acknowledged her signature in their joint presence, and this was not done. In other words, the failure of Mrs. Viccars to subscribe her name as a witness to the will after the testator had acknowledged her signature on the will in the presence of both Mrs. Viccars and Mrs. Moon has, in my opinion, rendered the will invalid.[163]

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[161] Fourth Report of the Real Property Commissioners (1833) p. 17.

[162] [1954] O.W.N. 301,302 (Ont. Surr. Ct.).

[163] Id. at p. 303.

This is the typical approach to a will. It is extremely formalistic. There are counter examples, of course. Nothing in law is 100%. There have been a number of cases, for instance, in which a husband and wife mistakenly signed each other's wills.[164] When the will of the first to die was probated the mistake came to light and several courts have granted probate in these circumstances. The texts say this is "eminently sensible" but "contrary to the law".[165]

Testacy and Intestacy

Two facts allow the law of wills to be as formalistic as it is. One is the certainty of death, the other is our awareness of death's certainty. Everyone has a choice. People can make wills, in the formal, technical way required by law, in which case, they can count on the law to treat their wills in a formal, technical way, or they can die intestate, in which case the law is very precise and very technical about exactly what will happen to their property.

When a person dies, he or she dies either testate or intestate. There is no middle ground.[166] The law of wills tries to keep things that way. Making a will is complicated, but it can be accomplished, especially with the aid of a lawyer. If a person dies without a valid will, the law will treat him or her as if he or she *chose* not to make a will. That he or she may have tried to make a will and failed is legally irrelevant.[167] Intestacy means dying without a valid will. *Why* a deceased does not have a valid will does not matter. Other areas of law may be interested in why a person acted in a certain way, but the law of succession is not. It treats everyone who dies intestate in the same way, and is crystal clear about what happens to their estates. [168]

Bentham on the Formalities of Execution

Before we look at what is *substantively* required for the execution of a will, it is interesting to briefly consider Jeremy Bentham's views on the *procedural* formalities of execution. Bentham was one, if not the greatest, of English legal reformers, and his suggestions for the reform of the law of wills appeared only a few years before those of the Real Property Commissioners.[169] I discuss his views not because they were effective.

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[164] For citations and discussion, see A.H. Oosterhoff, **Text, Commentary and Cases on Wills and Succession** (3rd ed, Toronto, 1990) p. 190.

[165] Ibid. In **Appendix 5** I examine a case which takes an informal approach to a probate.

[166] People can die testate as to parts of their estate and intestate as to other parts. This happens when a will covers some, but not all of a person's property. There is still no middle ground.

[167] As pointed out, nowadays, the beneficiaries under an invalid will can recover in negligence against the lawyer, but as far as the law of wills is concerned, they get nothing under the will.

[168] In **Appendix 6** I take a hard example of intestacy.

[169] Bentham died in 1831. His **Rationale of Judicial Evidence** had been written much earlier but it only appeared in 1827, edited by John Stuart Mill. Bentham's analysis of the execution of wills is in Vol. II, Book IV, p. 435-579.

They were not. Bentham's views about punishment changed criminal law dramatically, but his views about wills had *absolutely no* effect on the law of succession. I discuss Bentham's views because they were so *totally at variance* with the law that they highlight the law.

Like the Real Property Commissioners, Bentham said the goal of the law was, "to secure the existence of true evidence and to guard against deception, considered as liable to be produced by *false* or in any other way *fallacious* evidence".[170] His analysis of the formalities to be required for the execution of a will is part of a logical and detailed analysis of the formalities that should be required for the execution of *all* private documents of conveyance. These Bentham called "contracts". He included wills amongst "contracts", but his treatment of wills was special. As he himself said,

> The demand, in point of use and reason, for the power of giving validity to a last will differs in several points from the power of giving validity to a contract of any other description, whether obligatory promise or conveyance: and, from the difference as to these points, follows a corresponding difference in respect of the formalities proper to be required, and the means proper to be employed in the view of enforcing observance.[171]

Bentham thought there were two differences between wills and other contracts. First, wills must be "revocable and subject to infinite alteration"; second, wills must frequently be made "on a death-bed, at a time when professional assistance may not be within reach; or in some place in which, or on some occasion on which, neither professional assistance nor promulgation paper (supposing any such implement to be required to be employed) would be obtainable".[172]

The "promulgation paper" of which Bentham speaks was the heart of the system he thought should be used for all documents:

> For each distinct species of contract let a distinct species of paper be provided, denominated according to the species of contract for which it is intended to serve: as for instance, marriage-contract paper, agreement paper, farm-lease paper, house-lease paper, lodging-lease paper, house-purchase paper, money-loan-bond paper and so forth.[173]

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[170] Id. at p. 438 (emphasis in the original).

[171] Id. at p. 514.

[172] Ibid.

[173] Id. at p. 483. In a footnote, Bentham adds: "guardian-appointment paper, apprentice-binding paper, partnership-contract paper, fire-insurance paper, ship-insurance paper".

This suggestion, like so many of Bentham's, is at once laughable and prescient. We now have many forms exactly like the ones Bentham wanted, but they do not contain one thing Bentham thought essential:

> In the form of a border to the sheet of paper, or at the back of it, or in both places, and (according to the quantity of the matter) either at length, or in the way of reference to a separate printed sheet or number of sheets, -- let an indication be given of so much of the law, as concerns the species of contract, to the expression of which, the paper is adapted.[174]

According to Bentham, if the law was not explained to people, it was no more than "tyranny". If people did not know the law, Bentham said, they could not follow it, and if people could not follow the law, it was unfair to punish them for not following it.[175] Declaring a document invalid was, according to Bentham, punishment by another name.[176] His major point in the discussion of wills and other documents was that the means for securing observance of the formalities required for the execution of a document should be "pointed suspicion, not nullification." In other words, a failure to comply with the formalities should make a document suspicious, not invalid.[177]

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[174] Id. at p. 483-4.

[175] For all the elaborate formalism of his style, Bentham sometimes said things exactly correctly and with tremendous power:

> Every law requiring a man, under a penalty, to do that which is not in his power; every such law, come it from whence it will, is an act of tyranny. Pure suffering, suffering without benefit, pure evil, is the fruit of it. Id. at p. 475.

[176] With all due respect, I think this is a profound mistake in Bentham's analysis.

[177] Bentham's objection to nullification was consistent with the larger theme of the **Rationale of Judicial Evidence**, namely, that "no species of evidence whatsoever … ought to be excluded". Vol. I, p. 1. According to Bentham, *everything* offered as evidence should be admitted and weighed for its probative value.

Bentham's scheme for reforming the law was much more elaborate and far-reaching than that of the Real Property Commissioners. He examined a whole variety of possible means of validating wills. The subject of seals, which Bentham called "sigillation" gave him the chance to indulge in some of the vituperation he so clearly enjoyed heaping on the legal profession, in this case, the judiciary. He said seals were "at one time an efficient and almost the sole security against fraud, but they had ""degenerated into an idle and mischievous ceremony". (p. 462) To this comment he appended the following footnote:

> In English practice, seriously mischievous. Under the fee-gathering system, judges, ever upon the watch for committing safe injustices, have extracted out of the absence of this useless ceremony, a pretence for applying the principle of nullification. Some instruments must have a seal, others will serve without it: more complication, more uncertainty; more disappointment and distress on the one part, more arbitrary power and predatory opulence on the other.

Bentham thought holographic wills, i.e. wills written entirely in the handwriting of the testator, were "the most effectual mode of authentication". (p. 460) In the end, however, Bentham did not say what formalities should be required for wills or any other document. He was not suggesting legislation, but explaining to legislators the factors which they should weigh when deciding what formalities to require.

According to Bentham, there might be all kinds of reasons why a will had not been executed in compliance with the formalities. There might be accidents or circumstances beyond the control of the testator.[178] To declare a will invalid because a testator was unable to perform the formalities would be "punishing" the testator for something he or she could not help. This, remember, Bentham called "tyranny" and, according to him, the fact that a will did not comply with whatever formalities were legally required should not nullify it "*on any other condition* than that of a full assurance of its being in a man's power to comply with the formalities, as well as of his being actually apprized of the existence of the obligation".[179]

Reversing the Burden

This suggestion by Bentham is extraordinarily radical; more radical, I think, than even Bentham realized. If it had been adopted, it would have reversed the basic structure of the law of wills. To understand why, we must examine the unique nature of the legal dispute involved in a wills case. In all other legal disputes, one party is trying to *keep* something that someone else is trying to *take*. The characteristic structure of litigation is *Taker* v. *Keeper*. The taker gets the burden of proof to start the litigation; the keeper gets the benefit of the doubt.[180]

In a succession case, the only person who could be spoken of as "keeping" the property in dispute is dead. Succession cases are always between would-be takers, and the first step in the law of wills is to decide which would-be taker to put in the position of "keeper". The most basic rule of the law of wills is that on death, the property of the deceased passes to his or her heirs at law, unless there is a valid will.[181] The heirs at law are put in the position of "keepers" and the beneficiaries under a will are put in the position of "takers".[182] This creates the basic burden/benefit structure of succession law. A party who would take under a will has the burden of proof; a party who would take by

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[178] Bentham imagined one:

> Suppose (for instance) that, to the validity of a contract of the description in question, the presence of a professional assistant (such as a notary), in the character of an attesting witness, be rendered necessary. It may be that one of the parties is in a precarious state of health, or on the point of embarking for a long voyage on board a ship which cannot be detained. Three notaries, and no maor, are so situated as to be within reach within the time: and of these, one is too sick to act, another is absent on a long journey, and the third, under the governance of some sinister interest withholds his assistance. Meantime one of the parties dies or, as above expatriates. Id. at p. 488 n.

[179] Id. at p. 519 (emphasis added).

[180] This is what it means to say law is conservative, see, p. 1.

[181] Legally, the property of a deceased passes to his or her personal representative, the executor or adminitrator of the estate. This is not the beneficial interest. The beneficial interest passes to the next-of-kin, unless there is a valid will, in which case it passes to the beneficiaries under the will.

[182] The beneficiaries under a will, therefore, do not just "take *under* the will", they "take *from* the heirs at law".

intestacy has the benefit of the doubt. A will is considered to be invalid, unless and until it is proven to be valid.[183]

Bentham would have had it the other way around. He does not say this explicitly,[184] but his insistence that a will should not be declared invalid "*on any other condition* than that of a full assurance of its being in a man's power to comply with the formalities, as well as of his being actually apprized of the existence of the obligation" effectively reverses the burden of proof, and reversing the burden would have squared very nicely with Bentham's perception of where the danger lay in wills cases.

In law, the benefit of the doubt is given to the party perceived to be in danger. Bentham thought the danger in wills cases was not from the probate of spurious wills, but from the disallowance of wills that should have been allowed. Given all the horrible things Bentham says about lawyers and judges, it is amazing to find him quoting Lord Mansfield as an authority for this proposition. Speaking of the formalities introduced by the *Statute of Frauds*, Bentham quotes Mansfield as saying, "I am persuaded many more fair wills have been overturned for want of form, than fraudulent have been prevented by introducing it."[185] Bentham accepted this completely and bolstered the argument by pointing out that the heirs at law, the people who take on an intestacy, have no good claim. "The legislator being unacquainted with the exigencies of individual families, the disposition he makes of the property after death is but a random guess, a makeshift: against its being the best adapted that can be made, there are many chances to one."[186]

The flavour here is obvious. The heirs at law have no special claim to an estate. If there is any evidence, however informal, indicating whom a property owner wanted the property to go to, that evidence should be followed. Bentham wrote of one real case he knew about:

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[183] It is ironic that the law of wills, which is always said to "abhor an intestacy", has intestacy as its default state. The presumption of documentary validity works against this basic structure . That is what gives it the ideological force necessary to split the burden..

[184] Bentham was not concerned with burden of proof. He does not mention it the **Rationale of Jucicial Evidence** and alludes to it, only in passing in his more famous work, **The Principles of Morals and Legislation** (Oxford, 1948). This book, which explains utilitarianism in the context of punishment, says punishment, like everything else, is justified if it produces more happiness than unhappiness and by-the-by notes that:

> All punishment is mischief: all punishment in itself is evil. Upon the principle of utility, if it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil. p. 281

Utilitarianism would have a completely different flavour if Bentham had said: "No legal rule has any effect without punishment and therefore, it is always just to punish someone for committing a crime, unless the punishment can be shown to produce more evil than good." On burden of proof as expressing the slant of the law see above, p. 8.

[185] *Windham v. Chetwynd*, 1 Burr. 414, 420, 97 L.R. 377, 381. Quoted in the **Rationale** at p. 524.

[186] Id. at p. 526.

> In the house in which I am writing this, some years ago, an only daughter, an heiress, being minded to add by her will to a scanty provision that had been made for her mother by the marriage settlement, a lawyer was sent, and a will drawn accordingly. Just as the pen was put for signature into the hand of the testatrix, she expired; and with her, the intended provision.[187]

Though he does not definitively say an unsigned will should be admitted to probate, Bentham gave this case as an example of the "pure evil" produced by disallowing or nullifying wills on the grounds of non-compliance with the formalities.[188]

Testamentary Capacity

As I said before, Bentham's views on the law of wills were of no influence. The formalities for the execution of a will were established by the *Wills Act, 1837*. They have been applied rigorously and have remained virtually unchanged ever since. The goals of the Real Property Commissioners were largely realized. Litigation over wills disposing of real property was drastically reduced and while one cannot say that everyone knows how to execute a will, one can certainly say everyone knows the process is technical and that a lawyer can assure it is done properly.[189]

To understand the process, it is necessary to start from the simple premise that there is only one alternative to intestacy, and that is testacy, which requires probate. To prove a will means proving the document offered as a will was properly executed. It also means proving two other things:

1. testamentary capacity and
2. knowledge and approval of the contents of the document.

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[187] Id. at 522-3, note.

[188] Fassberg takes this view of an Israeli case she discusses, see above, n. 127.

[189] If a lawyer fails to have a testator properly execute a will or drafts a will in such a way that it does not express the wishes of the testator, the disappointed beneficiaries have an action in negligence against the lawyer. *Wittingham* v. *Crease & Co.* (1978) 88 D.L.R.(3d) 353 (S.C.B.C.); *White* v. *Jones* [1975] 1 All E.R. 691 (H.L.) This has not always been true. It used to be said that the lawyer's only duty was owed to the client, the testator. Since the testator was dead when the wills failed, the testator suffered no damages. The estate might in theory have been able to sue for the fees which had been paid to the lawyer, but the beneficiaries, the people injured by the lawyer's negligence had no action.

When the law was that a negligent solicitor was not liable to a disappointed beneficiary, the courts spoke about the possibility of the law being otherwise in *very* strong terms.

> If this were law a disappointed legatee might sue the solicitor employed by a testator to make a will in favor of a stranger, whom the solicitor never saw or before heard of, if the will were void for not being properly signed and attested. I am clearly of opinion that this is not the law of Scotland, nor of England, and it can hardly be the law of any country where jurisprudence has been cultivated as a science.
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> *Robertson* v. *Fleming* (1861) 4 Macq, 167, 177

In Lecture VI, I have more to say about the presumption that the law could not *possibly* be any other way than the way it is.

These three facts – execution, capacity and knowledge and approval – are essential to probate. We have already looked at execution and seen how formalistic the proof of it is. I will look briefly at proof of capacity, where one extremely interesting problem arises, and then turn to knowledge and approval, in which the most formalistic legal rule I know occurs. My goal is not to give a complete exposition of the law of wills, but to illustrate its peculiarly formalistic nature.

Testamentary capacity is closely related to what we ordinarily call "sanity". If a person is a raving lunatic, he or she does not have testamentary capacity. But suppose an insane person has sane periods. What then? The answer is even a person who ordinarily lacks testamentary capacity may have capacity during sane periods. Proving that a will was made during a period of sanity will be difficult if the testator was insane most of the time, but if it can be proven that a will was executed during a sane period, that will is valid. Often this proof would come from the testimony of doctors or nurses, but the legal test for testamentary capacity is not the same as the medical test for sanity.

The classic statement of the legal meaning of testamentary capacity is contained in *Banks* v. *Goodfellow*, where it was said that to make a valid will, it was essential

> that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties – that no insane delusion shall influence his will in disposing of his property and bring about a disposal which, if the mind had been sound, would not have been made.[190]

So, a person who is insane by medical tests has testamentary capacity if he or she knows what a will is, knows what property he or she owns, knows the "natural objects of his or her bounty", and is not under any insane delusion regarding them. The undisputed facts in *Banks* v. *Goodfellow* were that

> the testator, John Banks, had at former times been of unsound mind. He had been confined, as far back as the year 1841, in the county lunatic asylum; discharged, after a time, from the asylum, he remained subject to certain fixed delusions. He had conceived a violent aversion towards a man named Featherstone Alexander, and notwithstanding the death of the latter some years ago, he continued to believe that this man still pursued and molested him; and the mere mention of Featherstone Alexander's name was sufficient to throw him into a state of violent excitement. He frequently believed that he was pursued and molested by devils or evil spirits, whom he believed to be visibly present.[191]

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[190] (1870) L.R. 5 Q.B. 549, 565.

[191] Id. at p. 551.

On these facts the court said the question was "whether partial unsoundness, not affecting the general faculties and not operating on the mind of the testator in regard to the particular testamentary disposition, will be sufficient to deprive a person of the power of disposing of his property…"[192]

The court answered this question by defining "the measure of the degree of mental power which should be insisted on":

> If the human instincts and affections, or the moral sense, become perverted by mental disease; if insane suspicion, or aversion, take the place of natural affection; if reason and judgment are lost, and the mind becomes a prey to insane delusions calculated to interfere with and disturb its functions, and to lead to a testamentary disposition, due only to its baneful influence – in such a case it is obvious that the condition of the testamentary power fails, and that a will made under such circumstances ought not to stand.[193]

The court went on to say something about the burden of proof: "No doubt, where the fact that the testator has been subject to any insane delusion is established, a will should be regarded with great distrust, and every presumption should in the first instance be made against it.[194]

To see how this presumption is applied, I will briefly examine two Canadian cases of more recent vintage. *Royal Trust* v. *Ford* involved the will of a testator who was 94 when he died.[195] When he was 35, he had married a 23-year-old woman. A few years after the wedding she went to Australia to visit her mother and when she came back, she confessed to having had an adulterous affair. The testator forgave her, and 11½ months later, she gave birth to a son. Five years after that, the couple separated.

Six years after the separation, the testator made a will in which he left the bulk of his estate to his then 11-year-old son, but over the next 20 years, the testator became more and more obsessed with his former wife's adultery. Eventually, he became convinced that he was not the father of her child. In 1956 he made a new will, leaving the son $50,000 out of an estate worth over $1 million.

The son challenged the second will on the ground that the testator was suffering from an insane delusion that he was not his father. At trial, the son lost. On appeal to the B.C. Court of Appeal, the son won. The Court held that the father was acting under an insane delusion. On further appeal to the Supreme Court of Canada, the son lost again.

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[192] Id. at p. 556.

[193] Id. at p. 565.

[194] Id. at p. 570.

[195] [1971] S.C.R. 831.

The second will was held to have been executed with testamentary capacity. The father, the Court said, was not acting under an insane delusion.

The disagreement among the judges demonstrates how easy it is for reasonable people to disagree about whether someone else had testamentary capacity. One reason for this can be seen in the second case, *Dynna* v. *Grant*.[196] This is a decision from Saskatchewan. Sarah Grant had three sons, Louis, William and Norman. She left $1,500 each to Norman and William, and the rest of her estate to the Heart Fund and the Association for the Mentally Retarded. She did not leave anything to Louis, who, with his brothers, sought to have the will denied probate on the grounds that their mother lacked testamentary capacity.

At trial, Mrs. Grant's doctor testified that she had been bright, alert and sane. The lawyer who drafted her will testified that Mrs. Grant had been alert and knew all about her sons and her property. He said she had had a general animosity toward all three sons and referred to Louis' wife as "that no-good Norwegian".

The trial court held that Mrs. Grant did not have testamentary capacity because she was suffering from an insane delusion regarding her daughter-in-law, Louis' wife. This decision was overturned on appeal. The court said,

> [T]here was no evidence whatever the deceased was suffering from any delusion upon which a finding of lack of capacity could be founded…. Her aversion to her sons was not based on any delusion and her dislike for her daughter in law because she was Norwegian was not founded on a delusion. *The mere dislike of a particular ethnic group per se does not constitute an insane delusion. The deceased's dislike was not founded on a belief in a state of facts which no rational person could believe. It was simply an eccentricity of character and not a delusion*.[197] (emphasis added)

It is small wonder if reasonable people disagree about testamentary capacity. The distinction between an "eccentricity of character" and an "insane delusion" is very hard to draw. The court says a delusion is "founded on a belief in a state of facts which no rational person could believe." This reference to a "rational person" is striking. The law puts a great deal of stake in the "reasonable person", but the "rational person" is not used at all. Were slave owners irrational? Was their belief in the inferiority of Black people "founded on a belief in a state of facts which no rational person could believe"? I do not know where to even begin to find an answer to this question. Human history seems to me to be a testament to the difficulty of deciding what facts "rational" people will believe.[198]

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[196] (1980) 6 E.T.R. 175.

[197] Id. at p. 180.

[198] The same question, incidentally, comes up in Wills Variation. In British Columbia, a will can be varied if a testator does not make adequate provision for a spouse or child. A testator, who wishes to disown a

Knowledge and Approval

One aspect of knowledge and approval is mistake. Suppose a will is intended to say one thing and, by mistake, it says another thing. If a testator executes such a will, is it valid? One could say that if a testator properly executes a paper as a will, it does not matter what it says. One could also say that since knowledge and approval is required to make a will valid, if it can be proven that there is a mistake in a will, that invalidates the will. Given these two options, the law of wills takes a formalistic middle road. It distinguishes between two *kinds* of mistake. One is a mistake made by a draftsperson in choosing the language used in a will. If the testator explains what he or she wants the will to provide and the lawyer who drafts the will uses the wrong words to accomplish that result, the testator is bound by the lawyer's mistake. The will is taken to say what the words in it say, even if those words can be proven not to express the intentions of the testator.

The other kind of mistake, which can be corrected, is a mistake *per incuriam*. The best example of this kind of mistake is a typographical error. If a will said, for example, "I revoke clause 7 of my prior will", when it was supposed to say, "I revoke clause 7(iv) of my prior will", that mistake could be corrected, but *not* by adding "(iv)" after "7". The single most formalistic legal rule I know is that words may be *deleted* from a will to correct a mistake, but not *added*.[199]

Conclusion

Proof of a document is a formalistic kind of legal proof. Proof of a will is especially formalistic. I hope I have said enough about the law of wills to show this. I add one more point about the law of wills to lead into the next lecture.

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child or exclude a spouse from taking under a will, is permitted to write a letter explaining his or her decision and s. 5(1) of the *Wills Variation Act* (R.S.B.C. 1996, ch. 490) allows a court to consider the testator's reasons. But s. 5(2) says:

> In estimating the weight to be given to a statement referred to in subsection (1), the court must have regard to all the circumstances from which an inference may reasonably be drawn about the accuracy or otherwise of the statement.

How much weight does the court give a statement saying: "I disinherit my son because he married that no-good Norwegian"? The answer would be obvious if the son had never married anyone, but what if the son had married a Norwegian woman? Is that grounds for disinheritance or not? It is very hard to answer this question from the authorities.

Is it irrational to think the earth is flat, that the sun revolves around it or that blood washes back and forth in the human circulatory system? Rational people once believed all these "facts". Today they might be considered signs of irrationality..

[199] The example I have given is a real one. In *Re Morris*, after a wonderfully careful judgment, Latey J. granted probate to the will with the numeral "7" deleted, sending it forward to construction reading: "I revoke clause of my prior will." Since extrinsic evidence is almost entirely inadmissable on construction, it would have been extremely difficult to make out what this meant. Luckily, as is noted in a footnote at the end of *Re Morris*, "the question of construction was resolved by agreement without litigation." [1971] P. 62, 82 (Grt. Br., P.D.A.) If it were necessary to read one case to get the flavour of wills law, I would recommend *Re Morris*.

What happens if a person can be proven to have made a will, but when the person dies, no will can be found? Suppose, for instance, a person dies in a fire that burns down his or her house. If the lawyer has an unsigned copy of the will, can it be given probate?[200] From a legal point of view, this question would be treated as one of *revocation*. A person can revoke a will in two ways: one is by executing another document with the same formalities required to execute a will.[201] A will can also be revoked by "the burning, tearing or destruction of it in some other manner by the testator, or by some person in the testator's presence and by the testator's direction, with the intention of revoking it."[202] This provision would be strictly applied. If a testator called a friend and told the friend: "Tear up my will", and the friend did it without the testator's being present, the will would *not* be revoked. If these facts could be proven, and a copy of the will still existed, it could be probated. Similarly, if a person tore up a copy of his or her will, thinking it was something else, a copy of that will could be probated.[203]

What does the law do if it doesn't know how a will was destroyed? To answer this question it is necessary to notice that one aspect of revocation is capacity. Just as a person must have testamentary capacity to execute a will, so a person must have testamentary capacity to revoke a will. A will made by a sane testator and later torn up when the testator was insane would not be revoked. The will would still be good and if the facts could be proven, it would be given probated.

If a sane testator is known to have been in possession of his or her will but when the testator dies, no will can be found, the law *presumes* the will was revoked. This presumption might be overcome if a sane testator were killed in a fire that destroyed his or her papers, particularly if the testator had spoken of the will shortly before death. But the presumption would *start* against the will. By contrast, if a testator is *insane* at the time of death, the presumption runs the other way. The testator is presumed to have destroyed the will while insane, and hence the revocation is presumed to be invalid. I offer this striking conflict in presumptions as a prelude to the next lecture.

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[200] Actually, this question is slightly wrong. The copy is not given probate. The copy is evidence of the contents of a will that is no longer in existence. That non-existent will is what receives probate.

[201] Typically, the document would be another will but one can execute a revocation all on its own. If a testator made a new will revoking an old one, he or she would die testate. If a testator executed a revocation, he or she would die intestate. Obviously, revocations all on their own are rare. A person who wanted to revoke his or her will without making a new one would be most likely to simply destroy the old will.

[202] *Wills Act*, s. 14(d), RSBC 1996, ch. 489. S. 15 incidentally, provides that a will is also revoked by the marriage of the testator "unless there is a declaration in the will that it is made in contemplation of the marriage".

[203] There is also a case in which a testator crumpled up a will and threw it in the corner. A housekeeper saved the crumpled up piece of paper and it was given probate. It was held not to have been revoked because it had not been "destroyed".

Lecture IV
Proof and Presumption in Tort Law

In Lecture I, I drew a distinction between law and the law. The law is the substance of the law, the actual legal rules that determine peoples' rights and duties. Law, by contrast, is the legal way of proceeding. I include legal proof in law. In this lecture, I dissolve the distinction between law and the law by showing that the idea of legal proof includes what has to be proven and what presumptions apply to proving it. These questions – what has to be proven and what presumptions apply to proving of it – are the substance of the law. I use tort law as an example.

A tort occurs when one person wrongfully injures another in some way other than by breaching a contract.[204] There are three kinds of torts: intentional torts, torts of strict liability and negligence. Both intentional torts and negligence require proof of *fault*.[205] The fault that must be proven in an intentional tort is that the defendant *intentionally* did something wrongful. The fault that must be proven in negligence is that the defendant *did not take as much or as good care* as a reasonable person would have taken in the same circumstances.

The torts of strict liability do not require proof of fault. What the defendant intended and how much care the defendant took are irrelevant. In every Common Law jurisdiction (except Australia, which has recently changed the law[206]) when a person brings something onto his or her land that is likely to do damage if it escapes, and it escapes and does damage, the person who brought the thing onto his or her land is strictly liable. That he or she took all reasonable precaution to keep the dangerous thing from escaping is irrelevant. The liability is *without fault*.[207] The person would be liable even if they took every possible precaution.

The intentional torts and the torts of strict liability are said to be "nominate", meaning each has its own name. There are many intentional torts: libel, slander, assault,

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[204] An action that breaches a contract may also be a tort, but it would be a tort even if there were no breach of contract. The fact that "tort" cannot be defined other than by contrasting it with contract says something very significant about tort law, but it is hard to be precise about what the significance is. It has something to do with the bigness of the area, the way it includes so many different aspects of life. In the discussion below, I treat contract very briefly as a form of strict liability.

[205] The word "fault" may, but does not necessarily carry the idea of guilt. See **Appendix 3**.

[206] See below, p. 153.

[207] It is strange to say that if a person brings a wild tiger home and it escapes and mauls a kid up the block, the person is "liable *without* fault". A more natural way to say this, it seems to me, is that such a person is "irrebuttably presumed to be *at* fault" for the kid's injuries. This observation summarizes much of what this lecture says about presumptions.

battery, trespass to land, trespass to chattels, false imprisonment, etc. There are several different torts of strict liability. The one I have just described, the liability of a property owner for the escape of something dangerous, is called *Rylands* v. *Fletcher*, after the case in which it first arose.[208] Another tort of strict liability, which so far as I am aware, exists in every Common Law jurisdiction, is *nuisance*. A person who unreasonably interferes with another person's right to the use and enjoyment of real property is strictly liable for that interference.

Because the word "unreasonable" is used in both negligence and nuisance, some people think nuisance is not a tort of strict liability.[209] This is incorrect. What is unreasonable in negligence is the *defendant's conduct*. What is unreasonable in nuisance is *requiring the plaintiff to suffer the injury (without compensation)*.[210] The two are related because as a practical matter, if the defendant's conduct is unreasonable, it will certainly be unreasonable to require the plaintiff to put up with whatever interference it creates. But, while the defendant's fault is *helpful* in a nuisance action, it is not required because in nuisance "[i]t is no defence that all possible care and skill are being used to prevent the operation complained of from amounting to a nuisance. Nuisance is not a branch of the law of negligence."[211]

In the United States, though not in other Common Law jurisdictions, the strict liability of *Rylands* v. *Fletcher* has been extended to cover any *ultra-hazardous activity* and strict liability has been extended to cover the manufacture and placing in the stream of commerce of any product causing injury by reason of a defect. In other Common Law jurisdictions, a defect in a product only renders a manufacturer liable, if the manufacturer knew or should have known of it.[212] That is negligence.[213]

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[208] (1886) L.R. I Ex. 265, L.R. 3 H.L. 330. (H.L.)

[209] See, Wexler, *The Defence of Statutory Authority in Nuisance and the Policy/Operation Dichotomy in Negligence: Tock v. St. John's Metropolitan Area Board Versus Swinamer v. Nova Scotia (Attorney General)*, 17 Adv. Q. 502 (1995).

That the law, which is supposed to be so careful about the use of words, often uses one word in two *completely* different ways used to please Jeremy Bentham no end. Of a contract he said:

> One mode of executing it is to authenticate the instrument by which the obligations are expressed; another was is to fulfill those obligations. What a nomenclature! in which the same word is employed to express the creation of an obligation and the annihilation of it!
>
> **Rationale of Judicial Evidence**, Vol. 2, p. 579.

[210] The primary remedy for a future nuisance is injunction. Damages are the remedy for past nuisances. Whether and when a plaintiff can be required to accept damages in lieu of an injunction for a future nuisance is a very difficult question and I do not treat it.

[211] **Salmond on Torts**, 10th ed (Sweet & Maxwell, 1945) p. 228-9, as quoted in *Russell Transport Ltd.* v. *Ontario Malleable Iron Ltd.* [1952] 4 D.L.R. 719, 728 (Ont. S.C., per McRuer, C.J.H.C.)

[212] And could have avoided it with a reasonable expenditure of energy, or as it is sometimes said, "at a reasonable cost".

[213] The person who actually *sells* a defective product to a person who is hurt by it (the penultimate link in the chain of distribution) is strictly liable for breach of contract because of the *Sale of Goods Act*.

The Plaintiff-Friendliness of Different Torts

The different torts have certain things in common, but each is a different *cause* of action. This means each tort differs from the others in terms of

a) *what facts must be* proven to establish liability and
b) what *presumptions* apply.

The facts that must be proven and the presumptions that apply to proving it make it harder to succeed in some causes of action than in others. Some torts, we might say, are more "plaintiff-friendly" than others.[214]

The term "plaintiff-friendliness" may be unusual, but the idea is very ordinary. The easier it is for a plaintiff to recover, the more plaintiff-friendly a tort it is. The harder it is, the less plaintiff-friendly. When the American courts moved tort liability for injuries caused by defective products from negligence to strict liability, the purpose of the change was expressly to make it easier for plaintiffs to succeed. Thus, one court said, "The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves."[215]

This is plaintiff-friendliness. An example of a move to less plaintiff-friendliness can be seen in *Reibl* v. *Hughes*, a Canadian case in which Chief Justice Laskin of the Supreme Court said, "In my opinion, actions of battery in respect of surgical or other medical treatment should be confined to cases where surgery or treatment has been performed or given to which there has been no consent at all.…"[216] Technically, if one person *touches* another without informed consent, that is a battery. Tort law presumes people give consent to the ordinary touches of ordinary life, but if a doctor cuts a person open, that is not an ordinary touching. A medical operation is a battery, unless the patient consented to the operation. For consent to be a defence, the plaintiff must have been

[214] As we will see in Lecture V, though Maitland does not use the term "plaintiff-friendly", he relies heavily on the idea of a plaintiff-friendly action in his description of the growth of the king's court in medieval England. See, p. 112.

[215] *Greenman* v. *Yuba Products, Inc.*, (1962) 377 P.2d 897, 901; 59 C.2d 57; 27 Cal. Rptr. 697; 13 ALR3d 1049 (per Traynor J.) The tort could be made even more plaintiff-friendly by removing the requirement that the product be "defective". This is considered to be too defendant-unfriendly.

[216] [1980] 2. S.C.R. 880, 890.

The facts that must be proven can be defined in ways that make them harder to prove or easier to prove.

fully informed. Laskin changed this and expressly said the change would make tort law less plaintiff-friendly because battery was an intentional tort

> consisting of an unprivileged and unconsented to invasion of one's bodily security. True, enough, it has some advantages for a plaintiff over an action of negligence since it does not require proof of causation and it casts upon the defendant the burden of proving consent to what was done.[217]

Some torts are more plaintiff-friendly than others. A plaintiff who could sue for either strict liability or negligence, and had to choose between the two,[218] would, all other things being equal, always choose to sue for strict liability because it would be unnecessary to prove the defendant had been careless.[219] Similarly, if a choice had to be made, a plaintiff would always prefer to sue for an intentional tort rather than negligence because more damages can be awarded if a defendant is found liable for an intentional tort.[220]

Plaintiff-Friendliness in Negligence

It is not just the different torts that are more or less plaintiff-friendly. The facts that have to be proven and the presumptions that apply to the proof of these facts vary infinitely *within* the tort of negligence.[221] This is *prima facie* surprising because negligence is a *single* cause of action. Each nominate tort is a *different* cause of action, so it is natural that what must be proven and what can be presumed varies from one to the other. That's what it means to be *different* causes of action. The nominate torts differ in terms of the activity producing the injury and the kind of injury produced. Some even differ in terms of who is injured. Negligence, by contrast, is one big all-inclusive cause of action. A negligence action can be brought by *any* legal person (a natural person, a company, the state or a foreign state), may be brought against *any* other legal person and can arise out of *any* sort of activity. A car accident, the eating of tainted cheese, a failed

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[217] Ibid. I discuss proof of consent below, but not the difference between proof of causation in intentional torts and negligence.

[218] A plaintiff does *not* have to choose. In Lecture II, I pointed out that a civil defendant can plead in the alternative, p. 32. The same is true for plaintiffs. If a chemical spill occurred on the plaintiff's land, the plaintiff could, and normally would, sue in trespass, nuisance, *Rylands* v. *Fletcher* and negligence. If there were a contract between the plaintiff and the defendant dealing with the handling of the chemicals that were spilled, the plaintiff would also sue for breach of contract.

[219] This is not a question of who has the burden of proof. In a tort of strict liability, it would be no defence even if the defendant could affirmatively prove the greatest care had been taken. The care taken is irrelevant in strict liability.

[220] I explain why, later in the lecture.

[221] I the next few paragraphs I explain why I say they vary "infinitely".

medical procedure, an inaccurate auditors' report, a stoppage of business, an un-sanded highway – all could lead to actions in negligence.[222]

To say negligence is *one cause of action* means that to succeed in negligence, *all* plaintiffs must prove the *same* facts. Every negligence plaintiff must prove

1) that the plaintiff suffered *damage,*[223]
2) which was *caused* by
3) the *negligence* of the defendant, i.e.,
    a) the *breach* by the defendant
    b) of the applicable *standard of care*.[224]

But while the same facts must be proven by every plaintiff in negligence, the facts to be proven can be defined in ways that make them harder or easier to prove. *Buchan* v. *Ortho Pharmaceuticals* dealt with a woman who suffered a stroke from taking birth control pills.[225] She sued the manufacturers of the pills in negligence, for

1) negligently making and selling a pill that harmed her and
2) not adequately informing her about the risks associated with taking birth control pills.

The court held that since there was no way to make a birth control pill that did not carry some risk of causing a stroke, the manufacturer had not been negligent in its manufacture of the pills.[226] In other words, birth control pills are not "defective" even

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[222] The only limitation on the generality of negligence is that certain kinds of injury are *not* recognized.

[223] To be "damage" an injury must be "cognizable" in the sense of being recognized by tort law. The grief one feels at the death of a child is a graphic example of something that is universally recognized as an injury but is not recognized by tort law as a "damage". What it means for grief not to be recognized in tort law must be defined (as everything in law must be defined) in terms of procedural consequences. The legal consequence of grief's not being recognized is that "mere" grief is not compensable. If a child is killed by a careless driver, a parent can recover compensation for the cost of burial and for any economic loss suffered. (For instance if the child were Shirley Temple, there would be an economic loss.) If the parent saw the child killed or saw the child's dead body immediately after the accident or in the hospital and that sight caused the parent to suffer a medically provable psychological injury, such as inability to work or sleeplessness or impotence, the parent could recover for what is called "nervous shock", but nervous shock is different from "mere grief". No damages are awarded for grief. We will return to damages later, particularly to the questions associated with *pure economic loss*, another injury which, until recently, was not compensable.

[224] Even if the plaintiff is successful in proving these facts, he, she or it will lose if the defendant did not owe the plaintiff a *duty of care*. Damage, causation and negligence are all questions of fact and hence must be proven. Duty is a question of law, and while it must be established, it is not proven. We will return to this later in the lecture.

[225] (1986), 54 O.R. (2d) 92.

[226] When an imperfection in a product gives a manufacturer a duty to warn about the imperfection and when it gives a manufacturer a duty not to sell the product is a question our law does not answer systematically. See, S. Wexler, *Liability for Medical Products*, 30 UBC L.R. 319, 329-30 (1996).

though they cause strokes in some women. But the manufacturer of a product does have to warn people of the dangers associated with the product and the warnings about the risk of strokes issued with the pill in Canada were considerably weaker than the warnings issued with exactly the same pills in the United States. This looked like negligence, but the company argued that, even with the stronger warning, millions of American women took the pill. The company said Mrs. Buchan could not prove that had she been given a stronger warning, she would not have taken the pill. Proof of this was essential because if Mrs. Buchan would have taken the pill regardless of the warning, the alleged negligence of the company in issuing a weak warning could not be said to have *caused* Mrs. Buchan's injury.

Two tests may be used to determine what a person would have done. One is called the "objective" test, the other, the "subjective" test. If the objective test is used, the court asks what a reasonable person would have done if an adequate warning had been given. If a subjective test is used, the court asks what Mrs. Buchan herself would have done. Obviously, the subjective test is more plaintiff-friendly because it puts a premium on Mrs. Buchan's testimony. This fact had been pointed out by Laskin, CJC in *Reibl v. Hughes*:

> It could hardly be expected that the patient who is suing would admit that he would have agreed to have the surgery, even knowing all the accompanying risks. His suit would indicate that, having suffered serious disablement because of the surgery, he is convinced that he would not have permitted it if there had been proper disclosure of the risks.…[227]

Laskin said the objective test was less plaintiff-friendly because it put a premium on the medical evidence:

> Can it be said that a reasonable person in the patient's position, to whom proper disclosure of attendant risks has been made, would decide against surgery, that is, against the surgeon's recommendation that it be undergone. The objective standard of what a reasonable person in the patient's position would do would seem to put a premium on the surgeon's assessment of the relative need for surgery and on supporting medical evidence of the need.[228]

In the end, Laskin decided that the objective test had to be used.[229] The subjective test was *too* plaintiff-friendly: "[T]o apply a subjective test to causation would … put a

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[227] [1980] 2 S.C.R. 880, 898.

[228] Ibid.

[229] Because the court is supposed to ask whether a reasonable person *in the plaintiff's position* would have consented, Laskin's test is sometimes spoken of as the "modified" objective test (e.g. in *Dow* v. *Hollis*, [1995] 4 S.C.R. 634, 672). I do not see this is a "modification" of the objective test. The test for

premium on hindsight, even more of a premium than would be put on medical evidence in assessing causation by an objective standard."[230]

But that was where a *doctor* was the defendant. In *Buchan*, the Ontario Court of Appeal said that where a *manufacturer* was involved, the subjective test was appropriate.

> The suggestion that the determination of this causation issue other than by way of an objective test would place an undue burden on drug manufacturers is answered by noting that drug manufacturers are in a position to escape all liability by the simple expedient of providing a clear and forthright warning of the dangers inherent in the use of their product of which they know or ought to know. In my opinion it is sound in principle and in policy to adopt an approach which facilitates meaningful consumer choice and promotes market-place honesty by encouraging full disclosure. This is preferable to invoking evidentiary burdens that serve to exonerate negligent manufacturers as well as manufacturers who would rather risk liability than provide information which might prejudicially affect their volume of sales.[231]

Let me give another example of the way the law's definition of a fact can make it harder or easier to prove. If a patient who was paralyzed after undergoing a medical operation sued the doctor for negligence, the patient might allege that the operation itself had been improperly performed. The patient would then have to prove the standard of care, that is, how the operation *should* have been performed.[232] If the doctor performed the operation in a way other doctors will testify was *im*proper, the patient will win. Not meeting the self-imposed standards of a profession is negligence. But what if all other doctors say the operation was properly performed? Can the patient try to prove *all* the doctors are wrong? Can the plaintiff try to prove the standard of the whole medical profession is too low?

There are cases in which courts have found that the whole medical profession was being less careful than it should have been,[233] but in *ter Neuzen* v. *Korn*, the Supreme Court of Canada said the burden should be against this happening:

> Where a procedure involves difficult or uncertain questions of medical treatment or complex, scientific or highly technical matters that are

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negligence is always said to be "objective" and the question is what a reasonable person in the defendant's position would have done.

[230] Ibid.

[231] (1986), 54 O.R. (2d) 92, 121.

[232] Or would have been performed by a reasonable doctor.

[233] *Anderson v. Chasney* [1949] 4 D.L.R. 71 (Man. C..A.) aff'd [1950] 4 D.L.R. 223 (S.C.C.).

> beyond the ordinary experience, and understanding of a judge or jury, it will not be open to find a standard medical practice negligent. On the other hand, as an exception to the general rule, if a standard practice fails to adopt obvious and reasonable precautions which are readily apparent to the ordinary finder of fact, then it is no excuse for a practitioner to claim that he or she was merely conforming to such a negligent practice.[234]

This distinction will obviously be difficult to apply.[235] More important, while the Court made clear that it was talking particularly about doctors, it is not clear whether the same distinction applies to other trades and professions. Are car manufacturers going to be able to argue that their whole industry cannot be found negligent for not including certain technical safety devices? How much less plaintiff-friendly this ruling will make negligence is not yet clear.

Negligence law is full of questions like this. Any fact can be defined in a way that makes it more difficult to prove, and any fact can be redefined in a way that makes it less difficult to prove. This is a sliding scale and creates a spectrum of plaintiff-friendliness. In Lecture II, I made a strong point of saying that the *standards* of proof do not run on a sliding scale.[236] There are three discrete standards of proof, not a spectrum of standards. The reason it *looks* as if there is a spectrum of standards is that there is a spectrum of facts to be proven.

The Spectrum of Presumptions

Alongside the spectrum of facts to be proven lies another spectrum, the spectrum of presumptions.[237] Presumptions vary in their legal effect. Some have more power;

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[234] [1995] 3 S.C.R. 674, 701.

[235] Doctors and lay people will disagree about what is a practical matter and what is a technical matter. The Supreme Court gives the example of doctors leaving sponges in people after surgery because at one time the medical profession did not routinely count the number of sponges inserted and then count the number as they were removed. This, the Court says, was not a technical matter, and therefore it was the sort of thing for which the whole medical profession could be found negligent. But when this question first arose, doctors would certainly have said that the matter involved techniques in surgery that only experts could understand.

[236] See p. 20.

[237] The spectrum of presumption and the spectrum of how hard it is to prove a particular fact may in fact be one spectrum, rather than two. I am not sure. If there are two spectra, they intersect or overlap to create waves as might happen for instance if you looked at a picket fence through a screen door. When they use this process on silk, it is called "moiré".

A presumption helps a party meet a burden of proof.

A presumption may help a little; it may help a lot.

some have less. Professor Morgan has identified the different procedural consequences that can flow from a presumption.[238] Some presumptions aid a party in meeting an evidentiary burden, but have no effect on the persuasive burden. Some presumptions aid a party in meeting a persuasive burden. Other presumptions do not just *aid* a party in meeting a burden, they *satisfy* a burden. Some presumptions are permissive: if a certain fact is proven, a jury *may* reach a certain conclusion. Some presumptions are mandatory: if a certain fact is proven, the jury *must* reach a certain conclusion. Some presumptions go further and *move* the burden of proof from one party to another. Some split it; some shift it.

The procedural effects of presumptions vary on a sliding scale, and since presumptions can work for or against a party, the spectrum of presumptions is best seen as running out in two directions from the centre.[239] Near the centre, presumptions have the least power; they help one party or inhibit the other, but only a little. As one moves toward the ends of the spectrum, the presumptions grow stronger, that is to say, they have greater procedural effect. Near the ends of the spectrum, one finds the *irrebuttable* presumptions, often spoken of as presumptions of *law* rather than *fact*.[240]

Presumptions of law are extremely powerful. They are conclusive. They amount to legal rules.[241] But they are not the ends of the spectrum. The spectrum of presumption, like the spectrum of light, runs out at both ends, past the visible. At both ends, out beyond even the irrebuttable presumptions, lie presumptions so strong they cannot even be seen. At what we might think of as the ultra-violet end of the spectrum there are presumptions strong enough to make it an *advantage* to have the burden of proof. These presumptions turn the "burden" of proof into what Thayer called the "privilege" of proof.[242]

At the infra-red end of the spectrum are presumptions so strong they create *invisible burdens of proof*. An example of an invisible burden of proof can be "seen" in American law at the time of the Revolution. Between 1775 and 1850, roughly the time between the Revolution and the Civil War, the United States changed from being an

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[238] E.M. Morgan, **Basic Problems of Evidence** (Cont. Leg. Ed. ABA, 1954) p. 31-44. In Lecture I, I explained that I found Twining's rationalist model of adjudication too thick. I have the same problem with Morgan's analysis of presumptions. I do not disagree with any of the host of interesting things Morgan says about presumptions. I do not think he noticed the most important things about them, however.

[239] It can be pictures as something like this: … +5, +4, +3, +2, +1, 0, +1, +2, +3, +4, +5 ….

[240] For instance, W.S. Holdsworth, **A History of English Law**, (London, 1903), Vol IX, p. 143. Irrebuttable presumptions are an aspect of the myth of conclusive proof, discussed in Lecture V.

[241] I would go so far as to say, legal rules amount to presumptions.

[242] There is, for instance, so much pre-appointed evidence of title that most poor people would gladly assume the "burden" which lies on the owners of property. In Lecture V, we will talk about what Thayer meant when he spoke of the "*privilege* of proof", p. 105, n. 343.

agrarian to an industrial or pre-industrial society.[243] The law of nuisance changed with the country.[244] At the beginning of the period, it was a nuisance if a person interfered with a neighbour's quiet and peaceful enjoyment of his or her land. By the end of the period, interfering with a neighbor's property was only a nuisance if the plaintiff could bear the burden of proving that the interference was *unreasonable*.

It sounds odd to say that in 1775 the defendant had the "burden of proof" on the issue of reasonableness. What we want to say is that, in 1775, reasonableness was not at issue in a nuisance action. It was irrelevant. But *irrelevance is a form of irrebuttable presumption*. When the burden of proving unreasonableness was placed on the plaintiff, it became apparent that the old law had placed such a heavy a burden on the defendant that it was invisible. The defendant was not permitted even to *try* to prove that an interference was reasonable. It was presumed that *any* interference with a neighbour's property was unreasonable. This unarticulated, irrebuttable presumption is part of what it means to call a society "agrarian". The presumptions characteristic of a society are always invisible. Foucault called them "*les secretes du bien connu*", well-known secrets.[245]

Torts Actionable Per Se

The structure of proof and presumption makes each tort more or less plaintiff-friendly. Some intentional torts are so plaintiff-friendly they are actionable *per se*: the plaintiff does not even have to prove that *damage* occurred in order to succeed. The mere fact that the defendant infringed on the plaintiff's rights is irrebuttably presumed to warrant an order requiring the defendant to compensate the plaintiff.

Most torts are *not* actionable *per se*. The torts that are actionable *per se* are older than the rest. They grow out of the old writ of *trespass*,[246] which included an allegation

[243] The railroad fire-cases discussed in **Appendix 3** come just after this and instead of talking about the US in 1850 as a "pre-industrial" society, we might call it a "railroad" society.

[244] M. J.Horwitz, **The Transformation of American Law: 1780-1860** (Harvard, 1977).

[245] M. Foucault, **Madness and Civilization** (New American Library, 1965) p. 12. Foucault's point is that some facts are so well-known they do not need to be mentioned. Facts such as these, invisible, unarticulated, background presumptions, are stronger than any articulated presumptions, and, while it is a mistake to ignore them, it is, unfortunately, very hard *not* to ignore them. That's the whole point. They are *meant* to be ignored. In Lecture VI, I will examine the well-known legal secret that women are a weaker vessel.

[246] The writ system is discussed in the next lecture.

Irrelevance is an irrebuttable presumption.

The presumptions that characterize a society are invisible.

that the defendant had acted *vi et armis*, that is, with force and violence. A trespass was a breach of the king's peace and so, from the earliest days, could be heard in the king's courts.[247] There were and still are three kinds of trespass: *trespass to land*, *trespass to chattels* and *trespass to the person*. Trespass to land was called trespass *quare clausum fregit*, trespass by breaking the "close" or enclosure. Trespass to chattels was called trespass *de bonis asportatis*, trespass by carrying off goods. Trespass to the person did not have one convenient Latin handle. It was described in terms of various physical actions. It is now subsumed under three intentional torts: false imprisonment, assault and battery.[248]

Generally, torts that are actionable *per se* are crimes as well as torts. The state may lay criminal charges for breaking and entering, theft or assault and battery. If any of these charges is proven, a defendant is found *guilty*. Lawyers and judges sometimes speak loosely of a defendant, being found "guilty" of the tort of assault, but an action in tort results in a verdict of *liability*, not *guilt*. This can be seen clearly in *Costello* v. *Calgary*.[249]

In November 1972 the defendant, the City of Calgary, Alberta, expropriated certain land belonging to the plaintiffs, Mrs. Costello and her daughter. The applicable law required that owners of property be given a certain amount of notice of any proposed expropriation. [250] Notice was duly given to Mrs. Costello, who lived in Calgary, but the registered letter sent to Mrs. Costello's daughter arrived at her last-known address in Ontario (as permitted by statute) only 17 days before the city council meeting at which the by-law expropriating the property was presented and passed. The act required "no less than three weeks" notice. To comply with the act, the Court said, the notice should have been mailed "on Oct. 30, or at the latest, Oct. 31".[251] It was mistakenly sent on Nov. 3.

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[247] In Lecture V, I explain Maitland's point that the jurisdiction of the king's court grew in medieval England because plaintiffs chose to sue there, rather than in the local courts. The reason plaintiffs chose to sue in the king's court was that new writs, with procedural advantages for plaintiffs, were available there. This is plaintiff-friendliness at its most overt.

[248] The torts of assault and battery are often spoken of as if they were the same, but they are two different causes of action. An assault is putting a person in fear of a battery.

[249] 152 D.L.R.(4th) 453, 53 Alta. L.R.(3rd) 15, (1997, Alta. C.A.) leave to appeal refused Mar. 1998 (S.C.C.).

[250] *Expropriation Procedure Act*, R.S.A. 1970, c. 130, s. 24(4) and (5) quoted in *Costello* v. *Calgary*, 143 D.L.R. (3rd) 385, at 386-8.

[251] This is an actual quote from the Supreme Court decision declaring the expropriation invalid. *Costello* v. *Calgary*, 143 D.L.R. (3rd) 385, 390. I love the idea of the 30th, or at the latest, the 31st. It reminds me of the phrase "three or four credible witnesses" in the *Statute of Frauds, 1677*, quoted in Lecture III, p. 57. I discuss it further in **Appendix 7**.

Ten years later, the Supreme Court of Canada held that the late notice rendered the expropriation void *ab initio*[252] and Mrs. Costello and her daughter sued the city for trespass. There was no "crime" here, indeed, the city argued that "it actually enjoyed statutory authority to occupy" the land. The Alberta Court of Appeal gave this argument very short shrift.[253] "The city undoubtedly *believed* that it had such authority, but it did not." The city's belief was irrelevant,[254] as were its intentions: the city also "sought to avoid liability on the ground that it did not *intend* to commit a tort." The Court said, "a trespass occurs, regardless of the *consciousness of wrongdoing*, if the defendant intends to conduct itself in a certain manner and *exercises its volition* to do so".[255]

The Court refused to accept the city's argument that "if it had committed a tort, the wrong in question was a mere 'technical' trespass."[256] It is irrelevant how technical a trespass is.[257] This is the whole point of trespass's being actionable *per se*: there does not have to be any "real" damage for there to be a trespass. All there must be is a violation of the plaintiff's property rights. Damage is irrelevant, as is intention and the knowledge that lies behind intention.

Intention and Knowledge

In *Costello* v. *Calgary* the defendant did not *know* it was trespassing. The defendant did something that turned out to be a trespass, and that was enough for liability. Sometimes knowledge is required for intention; sometimes it is not. If a person

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[252] *Costello* v. *Calgary*, 143 D.L.R. (3rd) 385, 395.

[253] For the city to claim to have statutory authority after the Supreme Court had decided it did not is essentially attempting to relitigate a decided case. In Lecture IV, I discuss why, on Greek legal theory, one was permitted to do so, and why on modern legal theory, one is not.

[254] The city's *belief* is a question of fact, not law. The city's belief is irrelevant to whether it did or did not have statutory authority. That is a question of law. "Undoubted" means a fact has either been proven conclusively or presumed irrebuttably, and my understanding of presumptions commits me to saying something very odd. The city is deemed or irrebuttably presumed to have believed what it undoubtedly did not. I have already referred to this oddness in the text, p. 80.

[255] 152 D.L.R. (4th) 453, 465.

[256] It did not dismiss it as firmly as it might have. Speaking for the court, Picard, J.A. said:

> I resist characterizing the trespass as being merely "technical". All the time, the Costellos were excluded from their land and were denied an opportunity to earn a profit on it. There is nothing "technical" on these facts. 152 D.L.R. (4th) 453, 466

With respect, earning a profit is not the issue. This was a trespass regardless of the purposes to which the owners would have put the land. The whole point about trespass is that whether it is "technical" or not is irrelevant on *any* facts. Of course, when it comes to *damages*, rather than *liability*, courts might well be influenced by the "technicalness" of the trespass.

[257] Irrelevant to liability, that is. As is obvious, the more technical the trespass, the lower the damages. "nominal" damages are damages for a technical trespass.

pours poison in a well and someone drinks it, that is a battery.[258] But if the person didn't know that what he or she was pouring into the well *was* poison, that would not be a battery. It might be negligence, but it would not be an *intentional* tort.[259] Similarly, if a person fires a gun at a log without knowing anyone is standing behind it, it is not an intentional tort if the bullet misses the log and hits someone. For an intentional tort to occur, the person firing the gun must know someone is there.[260]

Tort law presumes things do not happen by mistake or accident, so a person who fired a gun and hit someone else would have the burden of proving he or she *did not know* anyone was there. This raises the question of whether one can prove one did *not* know something.[261] People sometimes say a negative cannot be proven, but remember, in an ordinary tort action, a person is only required to "prove" something on a balance of the probabilities. If a person who felled a tree that landed on someone else's property were to show, for instance, that ever since he or she was a child, the spot where the tree fell had been spoken of in his or her family as belonging to them, that might well be enough to prove the person *did not know* the land belonged to someone else, but it would be irrelevant. It is trespass if you go on land (or drop a tree on land) to which your neighbour *in fact* has legal title.[262]

Some knowledge of the facts is essential to intention, some is not. It is not clear how much one must know about the surrounding circumstances to be found to have legally "intended" to perform an act,[263] and there is one intentional tort that can be committed with *virtually no knowledge*. In *Cassidy* v. *Daily Mirror Newspapers Ltd.*,[264]

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[258] Technically, it may not be a battery because the old forms of trespass had to be direct. Indirectly touching someone became actionable under *case*, a later writ. Thus, is was said that if one threw a stick and it hit someone, that was actionable in battery, but if one threw a stick and someone tripped over it, that was actionable in case. Case is the antecedent of negligence (and contract, through *assumpsit*). I find the example helpful on the question of knowledge and apologize for what may be a technical error. I'm not sure it is because I understand that "directness" was not always applied literally and in any case, I provide another example in the text, which is certainly direct.

[259] It would be negligence, if a reasonable person would have known it was poison or checked to see if it was poison.

[260] If someone fired at someone else, missed and hit someone who, unbeknownst to the person who fired, was standing behind the person who was fired at, that *would* be an assault because tort law *transfers* the wrongful intent. The intent, it is said, follows the bullet.

[261] In a criminal case, as we have seen, the prosecution may be required to prove beyond a reasonable doubt the victim of a rape did *not* consent or to prove beyond a reasonable doubt the defendant did *not* act in self defense. Having to prove a negative is not particular to proof of guilt. Having to prove it beyond a reasonable doubt is. This is one of the points of Lecture II.

[262] This use of the word "fact" is very important.

[263] It is as problematic outside of law as it is in law. For some very interesting philosophical observations on this question see, G. Vlastos, **Socrates: Ironist and Moral Philosopher**, (Cambridge Univ. Press, 1991) p. 148 ff. This is one of the best academic books I know. I am glad I found a place to cite it.

[264] [1929] 2 K.B. 331 (Eng. C.A.)

the defendant published a photo of a man and a woman, with the caption: "Mr. Cassidy and his fiancée". Mr. Cassidy, who also went by the name "Corrigan," had introduced the woman in the picture to the reporter as his fiancée and the woman had not demurred to that description.[265] It turned out that Mr. Cassidy was already married, and his wife sued for *libel*.

It is a libel if someone publishes a defamatory statement about someone else. A defamatory statement is one that draws a person into disrepute. What "disrepute" is and what it means to "publish" something are questions of law. A judge would instruct a jury on those questions, telling the jurors what facts they had to find in order to decide in favour of the plaintiff. After that, it would be up to the jury to decide whether the statement had been published and whether it had drawn someone into disrepute.

That the statement in *Cassidy* had been published was not in issue: it came out in a newspaper. A central fact in issue was Mrs. Cassidy's allegation that the caption on the photo had called her into disrepute. She said people knew her as "Mrs. Cassidy". They saw the caption and assumed she and Mr. Cassidy were not really married. The jury found for Mrs. Cassidy on this question and the case was sustained on appeal. That the defendant did not know there *was* a Mrs. Cassidy who *could* be libeled was held to be irrelevant.[266]

Libel is an intentional tort,[267] but the treatment of knowledge and intention in libel makes it virtually a tort of strict liability. Despite what we say about freedom of speech, there is a presumption in law that one should keep one's mouth shut. One speaks at one's peril. Publishing, we might say, is presumed to be an ultra-hazardous activity. The law reverses the children's maxim: sticks and stones can break my bones, but words can never hurt me. In law, uttering words is worse than shooting bullets. If a person shoots a gun at a log and unbeknownst to the shooter someone is behind the log, who gets hit, that is *not* an intentional tort. If unbeknownst to a publisher, there is someone behind the log to whom words are defamatory, it is libel if the words hit him or her.

The same presumption *against* publication is visible in the treatment of truth in a libel action. That a defamatory statement was true is an affirmative defence to libel.[268] It

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[265] I do not think this is the legal use of "demur".

[266] Mr. Cassidy had identified the woman as his fiancée and she had not demurred. Since the picture was taken at a race course, and Mr. Cassidy was known to be a "man about town", a reasonable person might have checked to see whether there was a Mrs. Cassidy, but whether the defendant took reasonable care to determine whether there was a Mrs. Cassidy was not at issue in the case. This was not an action in negligence. It was an action in libel. Taking sufficient care may be a defence if the person libelled is a public figure, otherwise it is irrelevant to liability. It would count greatly in determining damages.

[267] It is slander if the publication is oral, rather than in writing. The proof of slander is slightly different from the proof of libel, as are some of the presumptions which apply.

[268] As is the claim to privilege. There are some defamatory statements one is allowed to make in certain circumstances about certain people.

is somewhat awkward to say the presumption that speaking is an ultra-hazardous activity *shifts* the burden of proof to the defendant because the plaintiff never has the burden of proving falsity. That is the whole point. One would expect a person who sued someone else for saying something "defamatory" to have the burden of proving that what was said was *a lie*. It is easy to see why it is tortious to defame an honest person by calling him or her a cheat, but does one "defame" a cheat by calling him or her a "cheat"? By making the truth of what was said *prima facie* irrelevant, tort law *prima facie* presumes the falsity of it.

The way truth and knowledge are treated makes libel more plaintiff-friendly than one would expect it to be. A recent change in the treatment of truth and knowledge in another tort has produced an exactly equal movement in the opposite direction. *Cambridge Water Co.* v. *Eastern Leather Plc*[269] was an action in negligence, nuisance and *Rylands* v. *Fletcher*. Before 1976, the defendants had brought a certain chemical onto their land to use in the processing of leather. No one thought the chemical was particularly dangerous. Over the years, quantities of it spilled, seeped into the soil and found their way into the water table below. This water was used for drinking. In 1985, long after use of the chemical had stopped, new regulations issued by the European Economic Community declared water containing the chemical unfit to drink. The question was whether the defendants were strictly liable for the escape of the chemical.

Strict liability means the defendant's intention is irrelevant; hence the defendant's knowledge *should be* irrelevant, but in the House of Lords, Lord Goff accepted the defendant's argument that it was not liable because it did not *know* the chemical was "dangerous". Lord Goff pointed out that even the original judgment in *Rylands* v. *Fletcher* had said a person had to "answer for the natural *and anticipated* consequences" of the escape from his property of "anything *likely* to do mischief if it escapes." Blackburn J. who decided *Rylands* v. *Fletcher* had even said a person was liable for the escape of anything "he *knows* to be mischievous" should it enter a neighbour's property.

Cambridge Water held that a plaintiff in an action based on *Rylands* v. *Fletcher* must prove the defendant knew at least that what was brought onto the land would be *dangerous* if it were to escape. This half-way converts *Rylands* v. *Fletcher* into an intentional tort. One is liable without fault for the escaping half of the tort, but the bringing-something-dangerous-onto-one's-land half of the tort is now intentional. This makes the tort less plaintiff-friendly.[270]

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[269] (1993), [1994] 2 A.C. 264, [1994] 2 W.L.R. 53 (H.L.)

[270] Every tort-law judgement makes a tort more or less plaintiff-friendly. All legal judgments concern six things:

1.	what facts must be proven in a law suit,	cause of action
2.	who must prove them and to what standard,	burden of proof
3.	what evidence is admissible to prove the facts,	admissibility
4.	what techniques are available to discover and prove the facts,	procedure
5.	in what forum and to whom the facts must be proven, and	jurisdiction
6.	the consequence of proving the facts.	remedy

Intention, Voluntariness and Action

To commit a trespass, one does not have to *know* one is trespassing.[271] It is enough if one goes on land that turns out to belong to someone else.[272] But one must *do* something. Simply *being* on someone else's land is not a trespass. For a trespass, there must be an *act* and in law, for there to be an act there must be a *voluntary* action. This is true of *all* torts.[273] An involuntary act *cannot* be a tort. If a person sneezed violently and banged into someone else, that would not be an intentional tort because sneezing is not an intentional act.[274] The effect of this can be seen in *Smith* v. *Stone*:[275]

> Smith brought an action of trespasse against Stone … [T]he defendant pleads … that he was carried upon the land of the plaintiff by force, and violence of others, and was not there voluntarily, which is the same trespasse, for which the plaintiff brings his action.

The plaintiff demurred to Stone's plea, that is the plaintiff argued that even if everything Smith said was true, it did not amount to a defence. Since proof of facts is put entirely to one side, a demurrer raises one of the purest questions of law.[276] On a

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There is supposed to be a line under #1. Cause of action is supposed to be substantive law. Burden of proof, admissibility of evidence, procedure, jurisdiction and remedy are supposed to be procedural law. I return to this distinction in Lecture V.

[271] The relationship between knowledge and intention is complicated. If you fell a tree and it falls where you intended it to fall, you have committed a trespass, if the land where it falls belongs to your neighbour. It does not matter that you honestly thought the land was yours. By contrast, if you fell a tree and it does not fall where you intended it to fall, that is not a trespass, even if you know the spot where it falls belongs to your neighbour. It may be negligence, but it is not trespass.

[272] Or remain on someone else's land after you have been asked to leave. Inaction is a form of action when your are legally required to act.

[273] Indeed, it is true for all law. An involuntary action is not a legal act. It cannot be a crime or a tort or anything else in law. Of course, if you knew you were liable to act involuntarily, your failure to take precautions would be an act.

[274] Despite the Lullaby of the Duchess, in L. Carroll, **Alice's Adventures in Wonderland**, ch. vii. "Speak sharply to your little boy and beat him when he sneezes. He only does it to annoy, because he knows it teases."

[275] (1647) Style 65, 82 E.R. 533.

[276] "Pure" because many questions of law involve questions of fact. In a sense, even the interpretation of a statute, which we might think was pre-eminently a question of law, is said to be the determination by the judge of the "intention of the legislature". To call this a fact is odd, however, since from the very earliest days, it has been held that no legislator may come and testify as to either his or her own intention or to the "intention of the legislature." The intention of the legislature is not a fiction, for reasons explained in the next lecture.

demurrer we *assume* the truth of the facts alleged, in this case by the defendant, and a judge tells us what legal ruling is proper on those facts.[277]

> In this case, Roll Justice said, that it is the trespasse of the party that carried the defendant upon the land, and not the trespasse of the defendant: as he that drives my cattel into another mans land is the trespassor against him, and not I who am the owner of the cattell.[278]

That an act is voluntary does not mean a person *wanted* to do it. A person can voluntarily do something he or she did not want to do. This can be seen in *Gilbert* v. *Stone*.[279]

> Gilbert brought an action of trespasse *quare clausum fregit*, and taking of a gelding, against Stone. The defendant pleads that he for fear of his life, and wounding of twelve armed men, who threatened to kill him if he did not the fact, went into the house of the plaintiff, and took the gelding. The plaintiff demurred to this plea; Roll Justice, This is not plea to justifie the defendant; for I may not do a trespasse to one for fear of threatenings of another, for by this means the party injured shall have no satisfaction, for

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[277] Obviously, at this point I am assuming that a judge today finds "the law" by looking at the decisions of prior judges. This is variously referred to as "*stare decisis*", or "Common Law" or "precedent". In the Civil Law, the judge tells us what the Code says "the law" is, that is, what decision a judge ought to make on the facts of the case before the court. I think the two processes must be analogous, but I do not presume to speak of Civil Law.

[278] There are three things to note about this case. First, the report of the judge's opinion is really a report. William Style, a lawyer, sat in court, listened to the cases and in the reports which bear his name (Style 65) he tells us what Chief Justice Roll said. In modern reports, a judge's opinion is prepared by the judge and printed verbatim. A second point to note is that the two quotes from the report are virtually the whole of it. Some of the cases in 98 English Reports (which collects the reports prepared by 6 lawyers: Jones, Latch, March, Style, Aleyn and Siderfin) take up a page or so, but most of the cases are reported three or four to the page. All begin with a *very* brief headnote. The headnotes of the seven cases that appear on pages 532-3 are: Arrest of judgement in an action upon the case upon an assumpsit; Demurrer to a plea pleaded by an aexecutor; Exception to a special verdict; Arrest of judgement in trespasse; Demurrer upon a special plea in false imprisonment; Special justification in trespasse pedibus ambulando; Demurrer to a plea in trespass quare clausum fregit. You can get a real feeling for the old law by reading these headnotes.

The final thing to note is that the headnote for *Smith* v. *Stone* is: "Special justification in trespasse pedibus ambulando". The report as I quote it in the text omits the phrase "pedibus ambulando", which I believe means the trespass was by "walking on foot" and the phrase "special justification". The point of Stone's plea is that he did not walk onto Smith's land; he was carried on and what was then called a "justification" is not what we would call a "justification". For the difference between a justification and an excuse, see G.P. Fletcher, *Fairness and Utiltity in Tort Theory*, 85 Harv. L.R. 537, 558 (1972). Essentially, Stone said: "I didn't *do* anything." This is different from saying either: "What I did was justified" or "What I did can be excused." The defence in this case is neither a justification, nor an excuse for a trespass; it is a denial that there *was* a trespass. This point becomes more significant later in this lecture.

[279] (1648) Style 72, 82 E.R. 539. Whether this is the same Stone who was sued in *Smith* v. *Stone* is not reported.

> he cannot have it of the party that threatened. Therefore let the plaintiff have judgement.

Notice that while the defence of involutariness succeeds in *Smith* v. *Stone* and fails in *Gilbert* v. *Stone*, in both cases, involuntariness is a *defence*. All through law it is presumed people act voluntarily. In tort, this means involuntariness must be pleaded and proven by the defendant. This is not a case of the burden splitting and the evidentiary burden moving alone to the defendant, as it would in a criminal case. In an ordinary tort case the burden does not split, it shifts. The defendant has the burden of convincing the jury (or the judge, if there is no jury) on a balance of the probabilities that his or her act was no *act* at all.

The Imprecise Nature of Presumptions

We can see something very interesting about presumptions if we examine the presumption that people act voluntarily. In *Smith* v. *Stone* this presumption was rebutted because the defendant had been *taken* onto the plaintiff's land. In *Gilbert* v. *Stone* the presumption was not rebutted because the defendant had been *coerced* into going onto the plaintiff's land. This is a very fine distinction and suggests that presumptions have a great deal of precision. They do not. We can be very precise about the legal *effect* of a presumption, but *presumptions themselves are not precise*. This is hard to demonstrate if we think about the distinction between making a person do something by *carrying* him or her somewhere and making a person do something by *coercion*. But it can be shown pretty easily, if we look at two other situations in which the presumption of voluntariness might arise.

If a person hit someone else under an insane delusion that the Devil was attacking, that would *not* be an assault. Similarly, if a baby kicked someone in the mouth that would not be an assault. But notice that if an insane person and a baby were sued in tort, the insane person would have the burden of proving that he or she had acted under the influence of an insane delusion, and hence involuntarily, while the baby (or the baby's guardian *ad litem*) would *not* have this burden. A baby is presumed to act involuntarily. At some point the burden shifts and the guardian of an infant (or child by then) has the burden of proving that an act that injured someone else was *in*voluntary. Where this occurs is necessarily unclear.

Presumptions are *not* scientific. We presume people act voluntarily and we presume infants do not. We know these two presumptions must intersect somewhere, but we cannot say precisely where they intersect. This is in the nature of presumptions. They are not precise.[280] We can be and are very precise about the legal *effect* of a

[280] On one of the best known and most precise presumptions, see Wexler, *Do We Really Need the Hand Formula?* 9 Tort L.R. 81 (2001).

Our law is very precise about the procedural effect of a presumption but very imprecise about when presumptions arise and precisely what is presumed.

presumption, but *we cannot be and never are precise about exactly what is to be presumed or when*.

A presumption means that from the proof of one fact, a jury may (or in some cases, must) infer another fact. The reason law cannot be precise about what is presumed is that the "fact" inferred is not a fact but an *evaluation* of a fact. We call it a fact to indicate that a jury may (or must) draw the inference, but the fact proven and the fact inferred are *different types of facts*. The fact that is proven is a fact about the world, which in theory could be proven by evidence. I will call this a "simple" fact. The fact that is presumed or inferred is not a simple fact. It is *characterization* or *evaluation* of a fact, which could not, even theoretically, be proven by evidence.

The proven facts are actions or events, the circumstances surrounding them, and the consequences to which they led. The presumed facts are the *intentions* of the parties, their *mental states* or *character*. From the proven fact that something happened, a jury does not infer that something *else* happened; it infers that someone was *responsible* for what happened. From the proven fact that a person did something, a presumption does not lead to the conclusion that the person did something *else*. It leads to a conclusion that the person did what they did *in a certain way*, in a way that makes the person either liable or not liable.[281]

What is presumed or inferred is *responsibility*. The kind of facts that are presumed are that a person did something *voluntarily*, or *meant* to do it, or *knew* what was going to happen. Presumptions are about *mental states*. They are about what people *knew*, what they *perceived* and what they *expected*. I have already pointed out that there is no theoretical reason why such facts *cannot* be proven, but *proving* them and *inferring* them are different. Presumptions move us from proof to inference and it is this that makes them necessarily imprecise.

The Ordinary-Course-of-Business Presumption

Let us start with a presumption of the weakest sort, an inference of common sense. Suppose a doctor were being sued for negligently failing to notify a patient about the risks involved in an operation. If the doctor proved that he or she had a standard practice of discussing the risks with every patient who was considering the operation, a jury could infer that the doctor had discussed the risks with the plaintiff. This is not a presumption of law, but it is very powerful. If something is proven to ordinarily be done

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[281] Sometimes this leads us to call what was done by a different name, sometimes it leads us to apply an adverb to it.

What is presumed or inferred is responsibility.

Presumptions are about mental states.

in the regular course of a routine, repetitive process, any sane person would presume it had been done in a particular case.

When I say this is a weak presumption, I mean its procedural effect is very small. The ordinary-course-of-business presumption would avoid a directed verdict for the patient who claimed not to have been notified of the risk.[282] The presumption would get the case to the jury, where the fact that the doctor ordinarily discussed the risks with patients would be weighed against the minimum evidence the plaintiff would have introduced, his or her testimony that he or she had never been told the risks.[283] The jury would either follow the presumption and find for the doctor or reject the presumption and find for the plaintiff. The verdict would depend on how credible the jury found the plaintiff and how credible it found the doctor.[284]

In this case the proven fact, that the doctor routinely discussed the risk of the operation with patients, looks very similar to the presumed fact, that the doctor discussed the risks with the plaintiff. But the presumption has an evaluation of the doctor's reliability or character built into it. It may seem as if the reliability of the doctor is established when the doctor proves the ordinary practice, but the jury must decide whether the usually reliably doctor was as reliable as usual. The ordinary-course-of business presumption cannot be applied without an evaluation or assessment of character. Some presumptions *result* in an evaluation or assessment of character, some presumptions *require* one before they can be used. All presumptions involve an evaluation of what happened or the character of the people involved. They are not just simple decisions about the facts.

[282] This is the *least* procedural effect a presumption can have. It may seem the same as the effect of *res ipsa loquitur* because it gets the case to the jury. But *res ipsa loquitur* works in favour of a party with the burden of proof, and, at least in the case of the doctor, the ordinary-course-of-business presumption works in favour of a party with the benefit of the doubt. The burden of proving the defendant failed to properly notify the plaintiff of the risks in the operation is on the plaintiff. If a judge were to direct a verdict for the plaintiff, that would be directing a verdict in *favour* of the party with the burden of proof. Judges are justifiably reluctant to direct verdicts *against* parties with the burden of proof. To decide that an evidentiary burden has not been met is hard; to decide that, as a matter of law, a persuasive burden *has* been met, is even harder. On this distinction, see **Appendix 4**.

[283] If the plaintiff were dead, his *statement* that he had never been told the risks might get in if, on his death bed, he told his wife: "The doctor never told me I could die, Becky. Sue him! Make the bastard pay!"

[284] There are all kinds of hidden presumptions that go into credibility, presumptions based on race, occupation, education, dress and deportment.

Presumptions involve a characterization of what happened or a judgment on the character of the people involved.

Res Ipsa Loquitur

I turn next to the best known presumption in tort law: *res ipsa loquitur*. This presumption was first articulated in 1863 in *Byrne* v. *Boadle*.[285] A man was hit and injured by a barrel of flour that fell on him when he was walking past a warehouse in which barrels of flour were stored and from which barrels were then being lowered onto a wagon. No one could say how the barrel came to fall on the man, only that it did. It was not even clear whether the barrel that hit the man was being lowered from the warehouse at the time it fell.

The man who was hit sued the owner of the warehouse for negligence, and the judge who presided at the trial dismissed the action at the close of the plaintiff's evidence. He ruled that the plaintiff had produced *no* evidence of negligence, no evidence from which a jury could find that the defendant or his employees had done anything they should not have done or failed to do anything they should have done. As counsel for the defendant pointed out when the case was heard on appeal, for all the evidence showed, the defendant's employees, if they were lowering the barrel, may have been "using the utmost care and the best appliances to lower [it] with safety".[286]

The Court of Exchequer reversed the trial decision. Pollock, C.B. said, "*res ipsa loquitur"*: the thing speaks for itself. "The fact of its falling is prima facie evidence of negligence.... If there are any facts inconsistent with negligence it is for the defendant to prove them.... if there is any state of facts to rebut the presumption of negligence [the defendant] must prove them."[287]

The procedural effect of *res ipsa loquitur* is to defeat the defendant's motion to dismiss at the close of the plaintiff's case, the motion that succeeded in the trial of *Byrne* v. *Boadle*. In all jurisdictions where it applies, *res ipsa loquitur* forestalls this motion by satisfying the plaintiff's evidentiary burden on the question of negligence. Whether it does any more differs from jurisdiction to jurisdiction. In Britain, *res ipsa loquitur* works, as Baron Pollock suggested, shifting the burden of proof to the defendant: "if there is any state of facts to rebut the presumption of negligence [the defendant] must prove them." In Britain, a jury is instructed that if it is not satisfied on a balance of the probabilities that the defendant was *not* negligent, it should find for the plaintiff.[288] In the United States, *res ipsa loquitur* satisfies the plaintiff's evidentiary burden, but does *not*

[285] Exchequer (1863) 2 H.& C. 722, 159 E.R. 299.

[286] 159 E.R. 299, 301.

[287] Ibid.

[288] *Moore* v. *R. Fox & Sons* [1956] 1 Q.B. 596; *Barkway* v. *South Wales Transport Co.* [1949] 1 K.B. 54.

Presumptions move us from proof to inference.

shift the burden to the defendant. In the United States, a jury is instructed that to find for the plaintiff, it must be satisfied on a balance of the probabilities that the defendant was negligent.[289]

Regardless of the exact procedural effect of *res ipsa loquitur*, the facts that bring the doctrine into effect may be spoken of as:

1) *circumstantial evidence* of negligence,
2) *prima facie evidence* of negligence,
3) evidence from which negligence may be *inferred*, or
4) evidence from which negligence may be *presumed*.

These are four different ways to say the same thing, namely, that from proof of one fact, another fact may be concluded.[290] *Res ipsa loquitur* means at least that when it is proven that an injury was caused by something wholly within the control of a defendant and the thing causing the injury does not ordinarily cause injury in the absence of negligence, a jury may infer that the defendant was negligent.

As I have pointed out, the facts that are proven and the fact that is presumed are not the same *kind* of facts. In *Byrne* v. *Boadle*, it was proven that the defendant was in sole control of the barrel of flour that hit the plaintiff and that barrels of flour do not ordinarily fall out of warehouses unless someone is careless.[291] From this, it was presumed that the defendant had been careless.[292] These are different types of fact. The proven facts are simple facts about the world; the presumed fact is a conclusion about responsibility.[293]

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[289] Speiser, **The Negligence Case: Res Ipsa Loquitur** (Lawyers Co-op, Rochester, 1972, 1991 pocket part) Vol. 1.

> The clear weight of modern authority is that the doctrine of res ipsa loquitur permits, but does not, even though the defendant offers no explanation of the accident, require, the trier of facts to draw an inference of negligence.... p. 96.

[290] When we speak of something be "deemed" to be so, we are leaning toward saying it is irrebuttably presumed.

[291] This second fact was not so much "proven" as assumed. We might say "judicial notice" was taken of it.

[292] In Canada, the precise procedural effect of *res ipsa loquitur* was so problematic that the Supreme Court abandoned the doctrine. *Fontaine* v. *British Columbia* [1998] 1 S.C.R. 424, 156 D.L.R. (4th) 577. In Canada, a judge or jury may still make use of the *reasoning* which underlies the doctrine of *res ipsa loquitur*, but the doctrine itself is no longer good law. To what extent this will effect decisions is not clear.

[293] In law, whether or not the defendant was negligent is called a "fact", but we should not be fooled by this. Calling whether the defendant was negligent a question of fact makes it a question for a jury to decide; it does not make it the same as the question who had control of the barrels.

Circumstantial evidence, prima facie evidence, inferred and presumed all mean the same thing.

Causation

Another presumption, very similar to *res ipsa loquitur*, was created in *McGhee* v. *National Coal Board*. The case involved a man who worked in a brick kiln.[294] There were no showers at the work site and the man had to cycle home from work each day, covered in brick dust. He suffered from dermatitis and sued his employer, the coal board, for negligence in not providing a shower. The trial judge,

> while finding that the respondents were at fault in not providing shower baths for the men who, like the appellant, worked under hot and dusty conditions in the kilns, yet dismissed the appellant's claim because he was not satisfied that the appellant had shown, on the balance of probabilities, that this breach of duty caused or materially contributed to his injury.[295]

The plaintiff's difficulty in proving causation arose because no doctor could say that not having a shower *caused* the plaintiff's dermatitis. Even if there had been showers, the doctors said, the plaintiff might still have gotten dermatitis just from being exposed to the brick dust in the hot kiln all day long. All the doctors could say was that not having a shower increased the *risk* of dermatitis.

No one suggested that the coal board was negligent just for allowing the man to work in the kiln.[296] The coal board's only negligence was not providing a shower, and the trial court found that proving an increased *risk* of injury was not the same as proving *causation* of injury. The Court of Appeal sustained, but on appeal to the House of Lords, the trial decision was overturned. Lord Wiberforce said,

> [T]he question remains whether a [plaintiff] must necessarily fail if, after he has shown a breach of duty, involving an increase of risk of disease, he cannot positively prove that this increase of risk caused or materially contributed to the disease while his employers cannot positively prove the contrary. In this intermediate case there is an appearance of logic in the view that the [plaintiff], on whom the onus lies, should fail – a logic which

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[294] [1973] 1 W.L.R. 1, [1972] All ER 1008.

[295] Id. at p. 5.

[296] This would be to go against the well-known secret that working people can be required to do dangerous things for their pay.

Different kinds of facts are proven and presumed: the facts that are proven are simple facts about the world; the facts that are presumed are conclusions about responsibility.

> dictated the judgments below. The question is whether we should be satisfied, in factual situations like the present, with this logical approach. In my opinion, there are further considerations of importance. First, it is sound principle that where a person has, by breach of a duty of care, created a risk, and injury occurs within the area of that risk, the loss should be borne by him unless he shows that it had some other cause. Secondly, from the evidential point of view, one may ask, why should a man who is able to show that his employer should have taken certain precautions, because without them there is a risk, or an added risk, of injury or disease, and who in fact sustains exactly that injury or disease, have to assume the burden of proving more: namely, that it was the addition to the risk, caused by the breach of duty, which caused or materially contributed to the injury? In many cases, of which the present is typical, this is impossible to prove, just because honest medical opinion cannot segregate the causes of an illness between compound causes. And if one asks which of the parties, the workman or the employers, should suffer from this inherent evidential difficulty, the answer as a matter of policy and justice should be that it is the creator of the risk … who should bear its consequences.[297]

In *McGhee*, Lord Wilberforce created a presumption that shifted the burden of proof on the question of causation. He did not call it a "presumption". Rather, he spoke of it as an "inference".[298] As I have already pointed out, these two are the same and after *McGhee*, negligence was much more plaintiff-friendly. A rebuttable presumption shifted the onus on the question of causation to the defendant in cases like this one.

Seventeen years later, in *Wilsher v. Essex Area Health Authority*, the House of Lords drew back a bit from *McGhee* and made negligence a little less plaintiff-friendly.[299] *Wilsher* arose when a catheter, monitoring the amount of oxygen being received by a prematurely born infant, was mistakenly inserted into a vein. The readings were lower than they would have been if the catheter had been properly placed into an artery and too much oxygen was administered to the baby. Excessive oxygen can cause blindness in infants, but there are other causes of blindness in infants and the doctors could not say exactly what had caused the blindness in this case. On the authority of *McGhee*, the trial judge held that the onus of proving the negligent insertion of the catheter had *not* caused the blindness lay on the defendants. Since this onus could not be met, the court found for the infant plaintiff.

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[297] [1973] 1. W.L.R. 1, 6.

[298] Lord Wilberforce was a little concerned about calling this even an "inference" of causation. "[T]o bridge the evidential gap by inference seems to me something of a fiction, since it was precisely this inference which the medical expert declined to make." Id. at p. 7. On fictions, see Lecture V.

[299] [1988] AC 1074, [1988] All ER 871, [1988] 2 W.L.R. 557.

The Court of Appeal affirmed, but the House of Lords reversed. Lord Bridge said that in cases like this the burden of proof does *not* shift to the defendant. He said *McGhee* had been misunderstood. Lord Wilberforce had been taken to speak for the whole House, but really he had not done so. If one examined the other speeches in *McGhee*, Lord Bridge said, one saw that the case meant that, in the absence of proof to the contrary, a judge or jury was *permitted* to draw a "robust, pragmatic" inference of causation, but not *required* to do so.[300] This inference or presumption met the plaintiff's evidentiary burden on the question of causation, but did not shift the burden to the defendant.[301]

Wilsher did not change the *presumption* created by Lord Wilberforce in *McGhee*. From the fact that the defendant increased the *risk* to the plaintiff a judge or jury may still *infer* that the defendant caused the plaintiff's injury. The proven fact and the presumed fact are the same before and after *Wilsher*. All that is different is the *procedural effect* of the presumption. *Wilsher* "fine-tuned" the plaintiff-friendliness of negligence by adjusting the procedural effect of the presumption.

I repeat the point I have made several times. Whether the defendant caused the plaintiff's injuries is not a fact like whether the defendant increased the plaintiff's risk of suffering the injury. Causation is a conclusion about responsibility. This is the point of Lord Wilberforce's judgment and it is implicit in speaking of a "robust, pragmatic" inference. At the front end of presumptions, we imput simple facts. At the back end of presumptions, we extract judgments of responsibility.

Breach of Fiduciary Duty

A new tort, breach of fiduciary duty, may slowly be breaking off from negligence. In *Norberg* v. *Weinrib* a woman sued a doctor for battery, negligence and breach of fiduciary duty. The plaintiff, a drug addict, had traded sex with the doctor for drugs and then sued him for touching her. The doctor's defence was that the plaintiff had consented to the touching. Both the trial court and the first appellate court accepted this defence. They said the plaintiff knew what she was doing and did it voluntarily. The Supreme Court of Canada reversed.

> The alleged tort of sexual assault in this case falls under the tort of battery. A battery is the intentional infliction of unlawful force on another person. Consent, express or implied, is a defence to battery. Failure to resist or protest is an indication of consent "if a reasonable person who is aware of the consequences and capable of protest or resistance would voice his objections" [citation omitted]. However, the consent must be genuine; it

[300] Id. at p. 1090.

[301] *McGhee* shifted the burden of proof. *Wilsher* split it, reflecting the feeling that Lord Wilberforce's comments smacked of guilt, which they certainly do. See Lecture II, on the difference between shifting and splitting the burden of proof.

> must not be obtained by force or threat of force or given under the influence of drugs. Consent may also be vitiated by fraud or deceit as to the nature of the defendant's conduct. The courts below considered these to be the only factors that would vitiate consent.
>
> In my view, this approach to consent in this kind of case is too limited.… A position of relative weakness can, in some circumstances, interfere with the freedom of a person's will. Our notion of consent must, therefore, be modified to appreciate the power relationship between the parties.

The tort of breach of fiduciary duty is defined in terms of the "power relationship between the parties". Where one person is in a subordinate position and is dependent upon another in a dominant position, it is virtually impossible for the weaker person to consent to the actions of the stronger. The presumption is that in those circumstances, the weaker party *cannot* give a free consent. This makes breach of fiduciary duty a very plaintiff-friendly tort. Because this tort has not developed fully there are many things we do not yet know about it, but it may also be plaintiff-friendly as regards remoteness.

Remoteness

Remoteness is one of the most difficult problems in negligence law. Part of the difficulty comes from the fact that in negligence law the word "remoteness" is used in three different ways.[302]

1) *Duty of Care*: A plaintiff can be too "remote" from the defendant in the sense that the defendant does not owe a duty of care to the plaintiff.
2) *Causation:* The injury to the plaintiff can be too "remote" from the act of the defendant in the sense that the chain of causation leading to the injury is too long.
3) *Damages:* The damage*s* suffered by the plaintiff can be too "remote" in the sense that they are not recognized in law as damages.

The first meaning of "remoteness" was involved in the famous American case, *Palsgraf* v. *Long Island Railroad*.[303] In *Palsgraf* a railroad guard was helping a passenger board a moving train and, in the process, a package the passenger was carrying fell to the tracks. It contained fireworks and exploded. "The shock of the explosion

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[302] The law's use of words in multiple ways has already been noted, see, n. 209. The use of "remoteness" in three ways is confusing for everyone, even Lord Denning.

> The more I think about these cases, the more difficult I find it to put each into its proper pigeon-hole. Sometimes I say: "There is no duty." In others, I say: "The damage was too remote."
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> *Spartan Steel & Alloys Ltd.* v. *Martin Co.* [1973] 1 Q.B. 27, 37 (C.A.)

[303] (1928), 248 N.Y. 339; 162 N.E. 99.

threw down some scales at the other end of the platform, many feet away. The scales struck the plaintiff, causing injuries for which she sues."[304]

Cardozo, C.J. held that Mrs. Palsgraf could not recover because "the conduct of the defendant's guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away."[305] The plaintiff was too "remote" for the guard to owe her a duty of care.

Another case involving remoteness of duty is *Bourhill* v. *Young*.[306] In that case a careless motorcyclist got into a serious accident just as a pregnant woman was getting off a nearby bus. The woman was too far away to see the accident and she was on the far side of the bus so she could not have been hit by debris, but the sound of the accident scared her so that she wrenched her back and later suffered a miscarriage. Lord Wright, speaking in the House of Lords, said the question was "not merely whether the act itself is negligent against someone, but whether it is negligent vis-a-vis the plaintiff"[307] and Lord Thankerton said it was not. "The appellant has failed to establish," he said, "that, at the time of the collision, the cyclist owed any duty to her."[308] Mrs. Palsgraf and Mrs. Bourhill were both too remote in the sense that there was no duty owed to them.

The second meaning of remoteness, remoteness of causation, can be seen in *Owners of Dredger Liesbosch* v. *Owners of Steamship Edison*.[309] On Nov. 26, 1928, the *Edison* negligently hit the *Liesbosch*, which was conducting dredging operations in the harbour of Patras, Greece. The *Liesbosch* sank and was totally lost. The owners of the *Liesbosch* did not have the funds to replace her immediately so the dredging was held up for six months. This was a very costly delay and the question in the case was whether the losses sustained in completing the dredging could be recovered. The House of Lords held that these losses were too remote. Lord Wright said,

> [I]f the appellants' financial embarrassment is to be regarded as a consequence of the respondents' tort, I think it is too remote.… The law cannot take account of everything that follows a wrongful act.… Thus the loss of a ship by collision due to the other vessel's sole fault, may force the shipowner into bankruptcy and that again may involve his family in suffering, loss of education or opportunities in life, but no such loss could

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[304] Ibid.

[305] Ibid. That the remoteness went to duty was clear to Cardozo. "The law of causation, remote or proximate, is thus foreign to the case before us." Id. at p. 101.

[306] [1943] A.C. 92.

[307] Id. at 108.

[308] Id. at 100.

[309] [1933] A.C. 449 (H.L.). Some comment on this case, which differs slightly from my comments here, can be found in S. Wexler, *The Impecunious Plaintiff: Liesbosch Reconsidered*, 66 C.B.R. 129 (1987).

> be recovered from the wrongdoer. In the varied web of human affairs, the law must abstract some consequences as relevant, not perhaps on grounds of pure logic but simply for practical reasons.[310]

The third kind of remoteness concerns, not the duty of care or the causation of the injury, but the damages themselves. Some damages are simply not compensable. The classic instance of this is what are called "pure economic losses". Suppose a truck negligently runs into a bridge over a highway. The bridge is used by a company that has its factory on one side of the road and its storage area on the other. The accident puts the bridge out of commission and the company suffers serious financial losses because it cannot use the bridge.

One might think these losses were too remote in the *Liesbosch* sense, but they are not. If the company suffering the financial loss *owns* the bridge, the loss is said to be "consequent" on the injury to the company's physical property, the bridge, and is recoverable. It is only if the company does *not* own the bridge that the losses it suffers are "pure" economic ones and for many years, the rule was that pure economic losses were not recoverable in negligence. This was called "the rule in *Cattle* v. *Stockton Waterworks*".[311] The name came from a British case but applied in all Common Law jurisdictions. Cardozo C.J. gave one of the classic statements of the reason for the rule: if a defendant could be liable for pure economic losses, Cardozo said, there might be "liability in an indeterminate amount for an indeterminate time to an indeterminate class".[312]

The law has changed on pure economic losses and is changing still. For a while, we talked as though the courts of the different Common Law jurisdictions had carved *exceptions* into the rule. Now, the exceptions have become so numerous and so large that they may have become the rule. We used to say pure economic losses *cannot* be recovered, except in certain circumstances; we may now have to say they *can* be recovered, except in certain circumstances. The question now is whether the losses were "foreseeable". If they were, they can be recovered. If they were not, they cannot.

The idea of foreseeability takes us back to intention. How can one intend to do something one could not foresee? In considering this question, we must bear in mind that remoteness only applies in negligence. It does not apply to intentional torts. In intentional torts, it is clear one can intend something one did not foresee, and thus, in intentional torts one can be liable for damages that in negligence would be too remote. In *Bettel* v. *Yim*, for instance, the defendant, a shopkeeper, shook the plaintiff, a young boy who had been throwing matches at bags of charcoal in the shop.[313] The plaintiff's nose

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[310] Id. at p. 460.

[311] L.R. 10 Q.B. 453; 44 L.J.Q.B. 139; 33 L.T. 474; 39 J.P. 791 (1875).

[312] 174 N.E. 441, 444 (N.Y.C.A. 1931)

[313] (1978), 20 O.R. (2d) 617, 88 D.L.R. (3d) 543, 5 C.C.L.T. 66 (Ont. Co. Ct.).

accidentally smashed into the defendant's head. The plaintiff sued in battery because the shaking was intentional. The court said that if "the defendant was guilty of deliberate, intentional and unlawful violence or threats of violence … and a more serious harm befalls the plaintiff than was intended by the defendant, the defendant, and not the innocent plaintiff, must bear the responsibility for the unintended result."[314]

The court quoted Prosser:

> Apparently the courts have more or less unconsciously worked out an irregular and poorly defined sliding scale, by which the defendant's liability is least where his conduct is merely inadvertent, greater when he acts in disregard of consequences increasingly likely to follow, greater still when he intentionally invades the rights of another under a mistaken belief that he is committing no wrong, and greatest of all where his motive is a malevolent desire to do harm.[315]

This is the sliding scale I spoke of above, and by way of concluding this discussion of liability in tort, I will suggest, without citing any authority, that where there is a breach of fiduciary duty, remoteness may not matter. Indeed, where there is a breach of fiduciary duty, tort law may be even more plaintiff-friendly than when there is a malevolent desire to do harm.

Damages

The spectrums of proof and presumption create a spectrum of plaintiff-friendliness that runs across the different torts and across the one big, inclusive tort of negligence. To notice this only begins to scratch the surface, however, because the spectrum of proof and presumption affects the plaintiff-friendliness of *damages* even more than it does the plaintiff-friendliness of *liability*. Once a defendant is found liable for having committed a tort, it must be decided how much to order the defendant to pay the plaintiff and *quantum of damages* is a question of fact. The decision of this question does not so much vary from tort to tort or across the tort of negligence; it varies from *case to case*. Damages have to be hand-tailored in every trial. Because of this and because the law on damages varies so much from jurisdiction to jurisdiction, there is very little that can be said generally about the subject.[316]

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[314] Id. at p. 628.

[315] Id. at p. 627, citing, Prosser, **Law of Torts** (4th ed. 1971) p. 30-1.

[316] In Britain, for instance, by statute, it is now possible to award periodical payments rather than a lump sum damages for personal injuries. *Damages Act, 1996*, s. 2(1), See, H. McGregor, **McGregor on Damages** (Sweet & Maxwell, 1997) p. 1001-2. Many of the most difficult questions about proof of damages dealt with proving what lump sum was required to compensate the plaintiff over the course of the future. I discuss inflation, a factual question associated with the calculation of lump sum awards, in **Appendix 8**. Some of my comments there are based on a lecture given by the Hon. Mr. Justice Kenneth Mackenzie of the British Columbia Court of Appeal.

I do have a few comments, however. In law school, we study liability and not damages, as though liability were the dog and damages were the tail. This is completely backward. Damages are the dog and liability is the tail. Most tort actions are about *damages rather than liability*. Thirty-five percent of courtroom time in British Columbia is devoted to motor-vehicle negligence actions. "Aching-back cases" the judges call them, because the question in most of them is how soon the plaintiff can go back to work. Only a tiny proportion of the litigated motor-vehicle negligence actions deals with the liability of the defendant.[317] In most of the cases, quantum of damages is the *only* issue. The case is not in court because there is a dispute about how the accident happened or who was responsible for it. The case is in court because the defendant's insurance company offered to settle for an amount the plaintiff considered too low.[318] The purpose of the trial is for the court to decide how much the plaintiff should receive.

The principle on which the quantum of damages is determined is *restitutio in integrum*. A defendant found liable for injuring a plaintiff must pay the plaintiff enough money to restore the plaintiff, in so far as money can do so, to the position he or she enjoyed before the defendant's negligence caused the injury.[319] The amount that will put the plaintiff back into the position he or she enjoyed before the tort was committed is *a question of fact*. This question used to be left up to a jury with very little direction, but it has been increasingly circumscribed with law.[320]

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[317] The liability of the defendant is at issue in a tiny percentage of motor-vehicle negligence cases and sometimes even when the defendant's liability is *legally* at issue, it is not *really* at issue. The insurance company has simply denied liability as a tactic in litigation. As long as the plaintiff is suing, the company will deny liability. When liability is really at issue in a motor-vehicle negligence action, it is not usually the defendant's liability, but the plaintiff's. The company has made an allegation of contributory negligence. Contributory negligence reduces a plaintiff's damages. A plaintiff who is found to have been 25% responsible for the accident, loses 25% of his or her damages. Negligence and contributory negligence are treated as if they were the same thing in different directions. In **Appendix 9**, I explain why I think this treatement is misguided.

[318] I use "insurance company" rather than "insurer" which is the more normal legal usage. This is because I think it is important to differentiate between natural people and legal persons. I think we would understand law better if we made it a practice to refer to companies as companies and people as people. I am sure I have not been consistent in this practice myself. Somewhere in this book, I will have fallen under the sway of the legal presumption that companies and people are comparable entities. The law itself is a bit ambivalent on this question. Only people can vote, but companies do have the right of speaking freely to influence elections.

[319] *Restitutio in integrum* is a medieval idea which we could not recreate today. It is based on the idea that a plaintiff has a *right* not to be injured. This idea is as quaint as the idea that *any* interference with a neighbour's property is a nuisance. In **Appendix 10**, I discuss the "no-fault" schemes that are ostensibly aimed at the fault aspect of negligence, but are really aimed at *restitutio*.

[320] The process of changing quantum of damages from a question of fact into a question of law recalls a comment made by A.W.B. Simpson in his lovely article, *Legal Liability for Bursting Reservoirs: The Historical Context of Rylands v. Fletcher,* 13 J. Leg. St. 209 (1984). I quote the comment and explain the context in which Simpson made it in **Appendix 11**.

Lecture V
The Persistent Myth of Conclusive Proof

A legal conclusion, as Thayer said, is the product of two things: reasoning and evidence.[321] To go from evidence to a conclusion *always* requires some kind of inference, if only the inference of credibility.[322] Since the inferences we are prepared to draw depend on who we are, what culture we live in and when,[323] it is not possible to have *logically* conclusive legal proof, but that is *not* what I mean when I say there is a persistent myth of conclusive proof.

There may be no *logically* conclusive legal proof, but there is often *psychologically* conclusive legal proof, legal proof that anyone would accept. I am prepared to accept psychologically conclusive proof as conclusive, so I do not say conclusive proof is mythical. What I mean when I say that there is a persistent myth of conclusive proof is that at various times, in various cultures, people have talked, in one way or another, as if their legal system contained a *systematic technique* for producing conclusive proof. The myth is not that conclusive proof is possible, but that there is a *reliable* way to generate it *consistently*. There is no such thing and yet Greek law, medieval English law and modern law all share the myth that their law has such a technique. I do not know if this myth is universal, but it is persistent, at least in Western culture.

The techniques Greek Law and medieval English law treated as capable of systematically creating conclusive proof are not the same, but they are related to each other in various interesting ways. Modern law retains echoes of these techniques, but as moderns, we are all too aware that logically conclusive proof is not possible. We have, therefore, dropped the word "proof" from the myth and moved it from questions of fact to questions of law. The persistent myth of conclusive proof has become the myth of

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[321] Indeed, Thayer's definition of evidence is that it is what is used to prove things *in addition* to reasoning. "When one offers 'evidence,' … he offers to prove, otherwise than by mere reasoning from what is already known, a matter of fact to be used as a basis of inference to another matter of fact…." Thayer, **Cases on Evidence** (Cambridge, Ma., 1892) p. 2 and **A Preliminary Treatise on Evidence at Common Law** (Boston, 1898) p. 263.

Whether one *must* have evidence to prove something, whether, that is, one can reason *a priori* to a "proof" is a question I do not address in this book.

[322] Id. At "[E]ven direct testimony, to be believed or disbelieved, according as we trust the witness, is but a basis of inference…."

[323] I do not offer any argument or authority for this proposition. Because of who I am and where and when I live, I take it for granted.

Legal conclusions are the product of reasoning and evidence.
To go from evidence to conclusion requires inference.
What inferences we make is not a matter of logic.
Therefore, it is not possible to have logically conclusive legal proof.

conclusivity. The myth as we have it is that legal rules can be conclusive. I will return to this point at the end of the lecture, but I will begin with a modern echo of the myth that is squarely related to legal proof.

The Dramatic Power of Conclusive Proof

Perry Mason was so good at proving things that he led me to misunderstand legal proof completely. In 82 books, 3,000 radio episodes and 271 TV shows, Perry Mason, a fictional lawyer created by Erle Stanley Gardner,[324] appeared for a criminal defendant accused of murder. As a criminal defence lawyer, Perry never once did what criminal defence lawyers ordinarily do, plead a client guilty in exchange for a reduced sentence.

The criminal justice system is built on guilty pleas, not trials.[325] Guilt does, of course, *occasionally* have to be proven, so there are criminal defence lawyers, who, like Perry Mason, specialize in conducting trials rather than entering guilty pleas. The task of such lawyers, however, is to defeat the prosecution's efforts to meet the burden of proving guilt beyond a reasonable doubt and Perry Mason never did this either. The burden the prosecution bears in a criminal trial is the heaviest known to law. A real criminal defence lawyer who did not take advantage of it would, in an elementary sense, be negligent, but Perry Mason *never* relied on the prosecution's having the burden of proof. Perry always *seized* the burden from the prosecution and bore it *himself*. For Perry, proof was not a burden; it was a privilege. In case after case, Perry Mason obtained his client's acquittal[326] by proving that the murder with which his client was charged had been committed by someone else.[327]

To understand the full significance of Perry's accomplishment, it is necessary to notice that Perry went one step further. He proved his client's *innocence* to a higher standard than the prosecution would have been required to meet in proving his client's *guilt*. Perry's proofs were never just proofs beyond a reasonable doubt. Perry's proofs were always proofs beyond any conceivable, possible, shadow of a scintilla of doubt! Perry's proofs were proof positive; absolutely, positively, conclusive proofs.

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[324] Gardener published 80 Perry Mason books between 1933 and 1970. When he died in 1970, the manuscripts of two completed books, ***The Case of the Fenced-In Woman*** and ***The Case of The Postponed Murder***, were found in his papers and published posthumously, in 1972. I have read all the Perry Mason books but my first introduction to Perry was through the TV show, which I saw in reruns. They were originally aired 1957 to 1966. The radio episodes were broadcast from 1943 to 1955.

[325] If guilt were not normally admitted, if it had to be proven, the system would break down.

[326] Actually, Perry usually had the charges against his clients dropped or dismissed. Most of the stories take place at preliminary hearings, rather than trials.

[327] Notice I say "in case after case". That is what is mythical, not conclusive proof itself.

There is often psychologically conclusive proof, but there is no consistent way to generate it reliably.

Perry's proofs could be conclusive because they were *never* constructed of evidence. Not that there wasn't plenty of evidence in Perry Mason's cases. There were smoking guns and bloody knives, corporate records and business accounts, dirty clothing and broken statuary. But all this evidence was introduced by Hamilton Burger,[328] the district attorney. Perry did not construct his conclusive proofs from evidence, he *de*-constructed them by cross-examining the prosecution's witnesses.[329]

So skillful was Perry at this art that he was able to get witnesses to reveal things they did not wish to reveal. Sometimes witnesses admitted things they were trying not to admit; sometimes they were caught out in lies and had to change their stories; sometimes they would boldly answer one of Perry's questions, smugly assured that their answers entailed only X (a fact they were prepared to admit) only to discover, when Perry asked his next question, that their prior answer revealed Y (which is what they had been hiding).

Perry would then use Y to ask a question that got him Z, and then he would use Z to ask a question that got him A, where A = An Admission of Guilt. Perry used cross-examination to unravel a pattern of deceit that had made it *look* as if his client had committed the crime. The denouement came when one of the prosecution's witnesses broke down and, in open court, often on the witness stand itself, confessed to the crime, under oath.[330] "All right!," the guilty party cried out, "I did it. I killed him!"[331]

In Perry Mason's hands, cross-examination had an almost mystical power to compel a guilty person to admit the truth. The compulsion was as real as if it had been physical. There was no escaping it. Torture could not have been more effective.[332]

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[328] I won't ruin the pun by making it explicit, but for those of you who do not see it, I will point out that Gardener was punning in the name he gave the DA.

[329] Perry employed the Paul Drake Detective Agency to find *facts* for him. Indeed, to Perry's discredit, he and Paul often barged in on women who were alone at home and browbeat them into revealing facts. But always in a good cause. Perry used the facts they revealed to construct his cross-examinations on behalf of *innocent* clients.

[330] Sometimes the witness was not on the stand. He or she had already testified and was sitting in the courtroom, with the public. The idea of the public is important to the myth of conclusive proof and we will return to it.

[331] This is the TV show. The endings of the books were more lawyerly, and more interesting because more varied and dramatic enough for a book.

[332] When I studied Soviet Law, in either 1966 or 67, my teacher, whose name I cannot remember taught me that Vishinsky the procurator general under Lenin in the late 30s called confession "the Queen of Evidence." I now learn that Vishinsky was merely quoting:

> The rediscovery of Justinian's Digest of Roman Law in 1070 opened the way to a legal renaissance, led by the law schools of Bologna, and to the widespread influence of Roman-canon law throughout Europe. Roman-canon law institues the model of the inquest, the inquisitio, in the place of the adversarial challenges of Teutonic models. It calls for a higher level of proof than was provided in the medieval ordeals, either from two reliable eyewitness accounts or else from confession of guilt by the suspect. Circumstantial evidence was in itself never enough to convict absent a confession, but it

The Mythical Status of Cross-examination

Cross-examination is a powerful tool; occasionally, one can unearth a lie with it and the threat of having lies uncovered, leads to settlements. But cross-examination is not as powerful as Perry Mason made it out to be. Cross-examination does not work *all* the time, or even *most* of the time, and yet, it has a virtually mythical status in law. It is spoken of with reverence, almost as an *aqua regia*, an acid that can burn away lies and leave pure gold: the Truth. The hearsay rules, which are often condemned by lawyers as ineffective and ridiculous are sustained by the value ascribed to cross-examination. In Lecture II, we saw the Real Property Commissioners and Jeremy Bentham disagreeing about the basic burden/benefit structure of the law of wills, but they agreed totally about the power of cross-examination. I have already quoted the Real Property Commissioners, who said, "the two witnesses are required to be present together, in order to remove the possibility of getting two accomplices at different times, and in order to force them to tell exactly the same story in Court, and thus to render perjury more easily discoverable by cross-examination". And Bentham said, "the most trustworthy mode" of "authenticating" evidence was "oral examination accompanied with cross-examination."

Of course, neither of these sources says cross-examination works *perfectly*. The Real Property Commissioners say it renders perjury "more *easily*" discoverable and Bentham says it is the "*most* trustworthy" mode of authenticating evidence. There is no assertion here of *absolute* discoverability or trustworthiness. That is why I speak of the *myth* of conclusive proof. A myth is not usually expressly asserted. If it is, it becomes a proposition, and thus refutable. A myth cannot be refuted because myths do not *assert* anything. Myths *allude* repeatedly to things, *as if* they were true, and the assumption that they are true becomes a background against which thinking takes place.

Myths are artful and the art is not a "high" art.[333] Myths must be an art for everyone; we must *all* have the myth in the back of our minds or it will not work as well. As modern people, we are consciously aware that when it comes to legal proof, we are dealing only with a "likelihood". We repeat, almost as a litany that in law we are arriving at "probability" only, not certainty. We carefully add that all we are doing in law is

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> could provide the basis for torture to obtain a confession. Torture thus was viewed as a way to ensure a higher level of certain evidence, more "scientific" proof. The suspect's confession of guilt came to be regarded as the most probative form of evidence: in the phrase of the medieval glossators, *confessio est regina probationum*.
>
> P. Brooks, **Troubling Confessions** (Chicago, 2000) p. 93.

H..J. Berman, **Justice in the U.S.S.R.** (New York, 1963) says that in 1953 the Soviet Union eliminated "terror in legal form." One example he gives of something which was eliminated is:

> Vyshinsky's doctrine that confessions have special evidentiary force in cases of counterrevolutionary crimes – based on the transparently false notion that people will not confess unless they are actually guilty p. 70.

Berman also says, "Vyshinsky's doctrine that the burden of proof shifts to the accused in cases of counterrevolutionary crimes was also repudiated." p. 71.

[333] Though Wagner is said to be one of its greatest practitioners.

getting "as close to the truth as we can," and speak *as if we had no emotional commitment to reaching it*.

"As if" is the key to a myth: in this case, the myth is our vaunted *emotional detachment* and the *conscious control of our minds* we like to think of as rationality. Judges instruct jurors to "disregard" evidence that they have heard. Is this possible? In their deliberations, jurors can, if they are scrupulous, refrain from mentioning evidence they have been instructed to disregard, but can they disregard it in their own minds? Since I do not want the burden of proof, I will not claim that people "cannot" disregard evidence. I will put the matter conservatively: not thinking about things we do not wish to think about is one of the hardest tasks human beings face. Our law blithely assumes it makes sense to ask this of jurors. It assumes jurors have full and total control of their minds.

Of course, when this is pointed out, modern people will admit that jurors do not have as much control as the law assumes. Consciously we know that is true, but we *talk* in law as if it were not. This is the power of myth. We assume judges and jurors can be objective and rational.

But look what happens in *every* Common Law trial. Before any witness can say anything to any judge or any jury, he or she must *swear an oath*! In Common Law trials witnesses swear on the Bible to tell "the truth, the whole truth and nothing but the truth, so help me God".[334] This is a very *primitive* form. In pointing that out I hasten to say, I am not *denying* its effectiveness. Oaths and cross-examination may be very useful devices; they may actually increase the *likelihood* that a legal trial will arrive at the truth. But surely, that is not their *sole* function. Oaths and cross-examination are symbols that set a mood of truth-telling and truth-finding.[335] Perry Mason is part of that mood, or as I call it, "myth".

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[334] Not every jurisdiction uses this formula, but it is the best known one. In our more pluralist age, a witness may "solemnly affirm" or swear by some other sacred ritual, like swinging a chicken overhead..

[335] Whether oaths do get people to tell the truth is not a question I address. I accept oaths as part of the law, indeed, I stress them as a feature of law, but I note here that Bentham's **Rationale of Judicial Evidence** which is primarily devoted to criticizing objections to the admissibility of evidence, also contains a long, involved critique of oaths. Bentham's objections to oaths are so powerful, his vituperation against law, lawyers and judges so venomous and his prose so elegantly stilted that his introduction to the "mischievousness of oaths" must be reproduced:

> Inefficacious as is the ceremony of an oath to all good purposes, it is by no means inefficacious to bad ones.… Under the name of the *mendacity-license* will be hereafter treated of at full length, one of the principal among the devices, by which, under the fee-gathering system, judges – the authors of unwritten law in both its branches, the main or substantive branch, and the adjective branch, or system of procedure, – have with so disastrous a success, pursued the ends, the real ends, under the fee-gathering system the only ends, of judicature. It is by the license granted to mendacity on both sides of the cause, that judges have given encouragemnt and birth to their best customers, the *malâ fide* suitors. It is by means of the vain and pernicious ceremony of an oath, that they have been enabled to grant and vend the mendacity license. (empasis in the original) Book II, ch VI, s. III, p. 386.

Perry Mason is not great art. It may not be "art" at all, but it is certainly part of a great popular art. As Damaška points out, "the adversary presentation of evidence by battling lawyers has been so successfully popularized around the world by novels, films and television that its association with English speaking justice is by now part of global popular culture".[336] Part of this symbol is the myth that there is a systematic way to produce conclusive proof on a regular, consistent basis. The fact that even in fiction Common Law trials sometimes fail to produce conclusive proof is irrelevant to the myth, as is the fact that in fiction, criminal trials sometimes conclusively prove 'facts' the reader knows to be false. The facts, if not completely irrelevant to a myth, are by and large irrelevant. You cannot disprove a myth. People can stop believing it, but not because it is disproven.

I call the *possibility of producing conclusive proof on a consistent, reliable basis*, a myth. In the rest of this lecture, I try to show how persistent this myth is by looking at some of the forms it has taken. I first explore oaths as they were used in medieval English law and classical Athenian law. I then deal with trial by ordeal in medieval English law and the torturing of slaves to produce evidence in classical Athens. Finally, I come back very briefly to modern law.

Oaths in Medieval English Law

The term "medieval English law" is not precise as to date. We could say it starts with the Norman Conquest because the Normans did bring some things with them that did not exist in Anglo-Saxon law: for example, trial by battle.[337] Other things, like the jury, pre-date the Conquest, or rather were brought to England by the Normans who "found that much of what they brought was there already".[338]

The period called "medieval England" does not begin sharply and if it has ended (and oaths and juries suggest that it may not have), the history of English law is the story of how various features of the early trial process dropped out or were changed over time. Some disappeared in the 13th century; others, in the 16th; still others lasted into the 19th century.[339] As I said, some might still be thought to exist today.

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[336] M.R. Damaška, **Evidence Law Adrift**, (Yale, 1997) p. 1. There are two aspects to this image. One is cross-examination. The other is objections to the admissibility of evidence on technical grounds.

[337] W.S. Holdsworth, **A History of English Law**, (London, 1903). "The "Anglo-Saxons seem to have been almost the only nation who did not possess" trial by battle. "It appeared in England as a Norman novelty." (Vol. 1, p. 308). Hereinafter, "Holdsworth".

[338] J.B. Thayer, **A Preliminary Treatise on Evidence at the Common Law** (Boston, 1898) p. 7. Hereinafter, "Thayer".

[339] For instance, Holdsworth (p. 310) says as late as 1818, "the case of *Ashford* v. *Thornton* (1 B. and Ald. 457) showed that battle was still a legal method of proof in appeals of murder." It was finally abolished in 1819.

While it is hard to date medieval English law, it is perfectly clear that any discussion of it must begin with Maitland's observation that "judgment preceded proof".[340] The judgment of the early medieval English courts was "not like a modern legal judgment".[341] Instead of the court's judgment being *based* on proof, the court's judgment determined who was to "make" or "give" proof, and how:

> When in our own day we speak of proof we think of an attempt made by each litigant to convince the judge, or the jurors, of the truth of the facts that he has alleged; he who is successful in this competition has proved his case. But in the old times proof was not an attempt to convince the judges; it was an appeal to the supernatural, and very commonly a unilateral act.[342]

As Thayer says:

> proof was largely "one sided," so that the main question was who had the right or, rather, the privilege of going to the proof.[343]

The judgment of the court was "a determination what form [the proof] should take … it determined, not only what the trial should be, but how it should be conducted and when, and what the consequences should be of this or that result".[344] Maitland continues:

> The common modes of proof were oaths and ordeals. It is adjudged, for example in an action for debt that the defendant do prove his assertion that he owes nothing by his own oath and the oaths of a certain number of compurgators, or oath-helpers. The defendant must then solemnly swear that he owes nothing, and his oath-helpers must swear that his oath is clean and unperjured. If they get safely through this ceremony, punctually repeating the right formula, there is an end of the case….[345]

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[340] F.W. Mailtand, **The Forms of Action at Common Law**, ((Cambridge, 1909) p. 15. Maitland himself recognized that this was "a startling proposition."

Mailtland describes the change in the courts in the first two lectures p. 1-19. For 25 years, I though Maitland's **Forms of Action** the best book on law, then I read Maine's **Ancient Law**, which goes deeper. Maitland is about English law. Maine is about law. I would still recommend Maitland as the best legal *writer*, and the first two lectures in **The Forms of Action** are *must* reading for anyone interested in law. Hereinafter, "Maitland".

[341] Ibid.

[342] Mailtand, p. 15.

[343] Thayer, p. 9.

[344] Ibid.

[345] Maitland, p. 15. The phrase "an end of the case" marks conclusive proof and we will return to it.

The party swearing the oath and his oath-helpers "have not come there to convince the court, they have not come there to be examined and cross-examined like modern witnesses, they have come there to bring upon themselves the wrath of God if what they say be not true. This process is known in England as 'making one's law'…".[346]

As is implicit in Maitland's last comment, the oath process was not *uniquely* English. Oaths were used all over Europe in various forms and the general use of oaths, ordeals and similar forms of proof is part of what we mean when we speak of the Middle Ages as the "Dark" Ages. From the death of the Classical Age (Greece and Rome) to the Renaissance, the beginning of the modern age, there was very little faith in human rationality.[347] Legal disputes had to be settled by God, not men. *All* proof, as a consequence, was conclusive.

I will return to oaths in a moment and look at the oath in Classical Athens, but first I must consider *the jury*. Because the jury grew up over the course of English legal history, it is necessary to say something about that as well. So first, a very short history of Common Law, then, the jury, then, oaths in Classical Athens.

A Very Short History of Common Law

Common Law and Civil Law gradually break apart after the discovery of Justinian's Digest of Roman Law in 1070. It may be only a coincidence that the Digest was discovered four years after the Norman Conquest, but the two events are intimately related. One of the major features of the Civil Law that grew up in medieval Europe comes from the Roman sense that there was a natural law, a *jus naturale*, which was to be found in what the different local laws of all the Imperial conquests had in common. In Civil Law, this became a respect for local, customary law. The Civil Code was seen as *adding* to customary law, not *replacing* it.[348]

The Normans could not afford any such idea after the Conquest. They were not about to put up with having the Saxons tell them "this is the way we *used* to do things". The first thing William the Conqueror did, after taking over, was convert customary title into positive title, by having ownership to all the land and resources written down in Domesday Book.[349] Civil Law develops as a layer over customary, local law. The

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[346] Ibid.

[347] I take this to be an obvious fact of intellectual history but I am not sure the human mind has changed much in its view of itself. Intellectual historians think it has, asserting essentially that the human mind has changed its view of itself.

[348] The relationship between Customary Law and Civil Law is not unlike that between Law and Equity.

[349] I have not seen this point made elsewhere. If someone else has said it, I apologize for not citing his or her work. One other point to be made about the split between Common Law and Civil Law is that it could not have occurred without the smallness of the English judiciary. In the 17th century there were a handful of lawyers and judges in England who ate together when they were in London and ate with the local

development of Common Law, as Maitland explains, is the process by which the king's court gradually usurps the jurisdiction of local, customary courts, and ultimately supplants them. The jury is part of this process. The king's court has the power to create new writs, and "the forms of action, the original writs, are the means whereby justice is becoming centralized, whereby the king's court is drawing away business from other courts".[350]

The oldest writ, *Praecipe in Capite* was an order from the king to his local sheriff:

> The King to the Sheriff greeting. Command X that justly and without delay he render to A one messuage with the appurtenances in Trumpington which he claims to be his right and inheritance and to hold of us his chief and wherof he complains that the aforesaid X unjustly deforceth him.[351]

The theory of *Praecipe* was contained in the phrase "to hold of us". Feudalism is a system of land ownership in which the king owns all the land in the country and parcels it out to his knights and high officials in exchange for serving him. They then parcel it out to their soldiers and officials for serving them and the soldiers and officials of the servants of the king parcel it out to their servants or henchman, and so on and so on, until finally it is farmed by someone or used as a pasture. On the theory of feudalism, the king can settle disputes between his servants, but not between their servants. The king's servants are supposed to settle disputes between their servants, but Henry II "placed royal justice at the disposal of anyone who can bring his case within a certain formula".[352]

> There is good reason to believe that Henry, in some ordinance lost to us, laid down the broad principle that no man need answer for his freehold without royal writ. … This does not mean that every action for freehold must be begun in the king's court; far from it.[353]

The action was supposed to be in the court of the next person up the chain from the plaintiff (the local lord of the manor, let's say). But the king would send a writ to this lord, saying,

> I command you that without delay you hold full right to A (i.e. do justice to A) concerning a virgate of land in Middleton which he claims to hold of

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lawyers and judges when they were travelling. In France alone, at the same period, there were thousands of judges. Common Law could not have worked in France.

[350] Maitland, p. 11.

[351] Maitland, p. 82.

[352] Maitland, p. 21.

[353] Maitland, p. 23.

> you by such and such a free service, and unless you do it my sheriff of Nottinghamptonshire shall do it, that I may hear no further complaint about this matter for default of justice.[354]

This is a *breve de recto tenendo*, or writ of right, and as Maitland says,

> it is worthy of notice that the Preacipe for land … and many other writs afterwards invented, are not in their first instance writs instituting litigation; that according to their tenor is not their primary object. The king through his sheriff commands a man to do something…. Only in case of neglecting to obey this command is there to be any litigation. May we not say then that the 'cause of action' in the king's court is in theory not the mere wrong done to the plaintiff or demandent by keeping him out of his land … but this wrong coupled with disobedience to the king's command.[355]

This is the beginning of a fiction. The king is responsible for the peace of the whole country and gradually begins to create writs that are supposed to protect the "King's Peace". Such a writ is the writ of novel disseisin.

> The King to the sheriff greeting. A hath complained unto us that X unjustly and without judgment hath disseised him of his freehold in Trumpington (after the last return of our lord the king from Brittany into England) …".[356]

The portion in parentheses at the end has to do with the fiction that "the King's Peace" traveled with him. The disseisin had to have occurred while the king was in England, and it had to have occurred recently, so the king could "legitimately" claim to be looking into

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[354] Maitland, p. 82-3.

[355] Maitland, p. 25.

[356] Maitland, p. 83-4. The end of the writ is quite interesting because of what it reveals about early procedure and the jury:

> And therefore we command you that if the afores[d] A shall make you secure to prosecute his claim [a bond], then cause the tenement to be reseised and the chattels which are taken in it and the same tenement with chattels to be in peace [a preliminary or interim injunction] until the first assize when our justices shall come into those parts. And in the mean time you shall cause twelve free and lawful men of that venue [the jury] to view the tenement and their names to be put in the writ. And summon them by good summoners that they be before the justices afores[d] at the assize afores[d], ready to make recognizance thereupon [the jury as witnesses]. And put by gages [mortgages] and safe pledges the afores[d] X [bail] or, if he shall not be found, his bailiff, [I will come back to this point in the text] that he be then there to hear that recognizance. And have there the (names of the) summoners, the pledges and this writ.

Notice that document itself, the writ, is supposed to be present. This harks back to points I made in Lecture III about the physical nature of a document.

a breach of his peace: dealing with violence, rather than with a dispute about ownership of property.

By gradual steps, the king's court begins to give more and more new remedies, but each one was tied to a particular writ and the writs were amazingly particular. If the plaintiff has been on the land himself and been disseised that was the writ of novel disseisin, but if the plaintiff's father, mother, sister or brother had been on the land and been disseised and since died (perhaps during the dissezure), that was the writ of mort d'ancestor. [357] There were writs of aiel, besaiel and cosinage, depending on whether the plaintiff claimed the dead ancestor who had been seised and disseised was his grandfather (aiel), his great-grandfather (besaiel) or his cousin. Each writ covered a particular allegation and which writ was issued was critical because the writs were applied very strictly. If the jurors came back and said the plaintiff's cousin had been seised and disseised, but the plaintiff had brought the writ of aiel instead of the writ of cosinage, he lost. He might be the heir of both his grandfather and his cousin but what had to be proven was exactly what was claimed in the writ, and the court would not allow a plaintiff to swear an oath to anything else.

The difference between a grandfather and a cousin barely scratches the surface of the formal technicality of the writ system. The writs were applied with a formalism that would seem insane today.[358] New writs were created to deal with every possible complexity of fact, and as the king's court was creating new writs to deal with new problems, the forms of procedure were changing. This meant that newly created writs were often "better" than old ones. For one thing, the older the writ, the more it was subject to delay:

> Among the causes which in the course of time have rendered justice more rapid we must reckon not merely good roads, organized postal service, railways, telegraphs, but also the principle that men can hand over their litigation and their other business to be done for them by agents, whose acts will be their acts…. [The] principal that every suitor may appear in court by attorney is one that grows up by slow degrees, and, like so many other principles which may seem to us principles of 'natural justice,' it first appears as a royal prerogative; the king can empower a man to appoint an attorney. But so long as litigants have to appear in person justice must often be slow if it is to be just; the sick man can not come so one must wait till he is well; one must give the crusader a chance of returning.[359]

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[357] Notice the "law French", the English legal term in a French form. The descendants of the Norman conquerors created these writs and law often has tripartite phrases, like "give, bequeath and devise" which are Anglo-Saxon, Latin and law French.

[358] Holdsworth, writing in 1925, a more formal time than today, speaks of the "*extraordinary* verbal accuracy" required in writs." (emphasis added) Vol VII, p. 6.

[359] Maitland, p. 24-5.

Under some early writs, the plaintiff could "betake himself to bed" for a year and a day. Under writs created later, this was not allowed and it was not just forms of procedure that were changing. The forms of proof were changing at the same time. If the plaintiff used a writ created at an earlier date, the defendant might have a right to demand trial by battle. With writs created later, the plaintiff might be able to swear an oath. With writs created still later, the plaintiff might be entitled to a jury in the form we now know it. "The right to a jury makes its appearance as a royal prerogative," Maitland says, and "in the competition of courts, therefore, the king's court has a marked advantage; to say nothing of its power to enforce its judgments it has, for those who can purchase or otherwise obtain such a favour, a comparatively rational process".[360]

The Jury

The jury died out on the continent. It prospered in England. Why is not clear,[361] but it is clear that the differences between Common Law theory of proof and Civil Law theory of proof grow primarily out of the use of the jury.[362] That is not to say the jury was *invented* in England. As we will see, the jury was taken to a very high form in ancient Athens and[363] existed all over Europe. It started out, however, as something very different from what it *became* under the Common Law in England.

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[360] Maitland, p. 18.

[361] Some credit it to the efforts of the Saxon Liberation Front, led by the Norman turncoat, Robin Hood.

[362] Adversariality is also important, but that is mostly a difference only in criminal law. In civil cases, Civil Law is every bit as adversarial as Common Law. Another important difference is the binding impact of cases. This may be partly due to the jury because it is related to the distinction between judge and jury, but the size of the English bar and bench and their dinners at the Inns of Court is a more important cause of *stare decisis* than the jury. The inadmissibility of evidence is strictly a feature of the jury. Civil Law used very technical, church-made rules about degrees of proof, but went to "free" proof after the French Revolution. Common Law may be moving more toward free proof now that the use of the jury is waning. The Supreme Court of Canada, for instance, has recently said that instead of using the hearsay rules, to determine admissibillity we should adopt a "principled approach". *R.* v. *Starr* [2000] 2 S.C.R. 144.

Ultimately, as Bentham made clear, the only really principled approach is to allow everything in and weigh it for what it's worth. One problem with that, of course, is that the rules of exclusion are a major feature of the protection the law affords citizens in police custody. This has to do with the presumption of innocence, an ideology that has so far run alongside the development of the jury.

What the future holds is, as always, unclear. I speculate a little about it in Lecture VI. On the difference between Common Law and Civil Law, Damaška, supra n. 401 and J.H. Perryman, **The Civil Law Tradition** (Stanford, 1984).

[363] Classics scholars talk as if the jury was invented in Athens, but I think this is wrong. I don't think juries were "invented" anywhere. Getting everyone together to resolve disputes is something people would naturally do. Athens is important for "inventing" democracy. It certainly invented the word, which comes from the Greek for "power" and "people": *kratos* and *demos*, but I do not like to think of it as having invented democracy. I prefer to say Athens abandoned or *de*-invented kingship. If I have to choose between kingship or democracy as the natural starting point for society, I choose to presume democracy. I'd rather see democracy as instinctual than invented because I think, the more instinctual anything is, the better chance we have of keeping it.

Jurors were originally members of the community who *knew* the facts. They were called together to decide disputes with which they were intimately familiar. On the manor – the small, largely self-sufficient farming community ruled over by a local lord whom it supported – everyone knew who owned what and got to pasture their cattle where and when. After 1066, the local lord was one of the Norman knights to whom the land of England was parceled out as a reward for aiding in the conquest, but there were local courts before the conquest. It was only gradually that the jury became what we know it as today, a body of impartial people who, theoretically, at least, know *nothing* about the case they decide … except the evidence presented in court.[364] "It is not till the sixteenth century that the practice of relying upon the sworn testimony of witnesses became general."[365] Before this, witnesses were mostly considered to be paid perjurers.

> [I]n 1450 Fortescue, C.J. is reported as saying, "If a man be at the bar and say to the court that he is for the defendant or plaintiff, that he knows the truth of the issue, and prays that he may be examined by the court to tell the truth to the jury, and the court asks him to tell it, and at the request of the court he says what he can in the matter, it is justifiable maintenance. [Maintenance was the crime of stirring up litigation.] But if he had come to the bar out of his own head, and spoken for one or the other, it is maintenance and he will be punished for it. And if the jurors come to a man where he lives, in the country, to have knowledge of the truth of the matter, and he informs them, it is justifiable; but if he comes to the jurors, or labours to inform them of the truth, it is maintenance, and he will be punished for it."[366]

Holdsworth goes on,

> By the middle of the seventeenth century the witnesses and jury were regarded as so distinct that "it was said by the court that if either of the parties to a trial desire that a juror may give evidence of something of his own knowledge to the rest of the jurors, that the court will examine him openly in court upon his oath, and he ought not be examined in private by his companions." In 1816 it seems to have been assumed that if a judge

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[364] In his discussion of judicial notice, Holdsworth says,

> [I]t was an old question among the civilians and canonists … could a judge have recourse to his private knowledge…? It was well established from an early date in English law that the judge must decide, not upon his own private knowledge, but upon the matters proved before him. Vol IX, p. 184.

[365] Holdsworth, p. 334.

[366] Holdsworth, p. 335.

> had directed a jury to find a verdict of their own knowledge a new trial might have been granted.[367]

This is very important. Jurors are not supposed to decide cases based on their knowledge from outside court. A juror is not exactly supposed to be a *tabula rasa* and know *nothing*.[368] A juror is supposed to know what a reasonable person knows, but no more. A juror's decision is theoretically supposed to turn solely on what he or she learns from the evidence in court.

The jury that knew the facts was used all over Europe; but outside of England, as witnesses became more common, juries vanished and were replaced with judges. Judges decided the facts (and still do) in Civil Law. In England, over the course of several centuries, the jury ceased to be a body that told what everyone knew and became a body that decided the facts by listening to witnesses and seeing evidence.

The form in which *we* know the jury[369] was developed in the English courts by slowly changing a form that we know quite well, but would have trouble finding anywhere in the modern world. In the medieval courts

> it was not the presiding officers, one or more, who were the judges; it was the whole company; as if in a New England town-meeting, the lineal descendants of these old Germanic moots, the people conducted the judicature, as well as the finance and politics of the town. These old courts were a sort of town meeting of judges…. The conception of the trial was that of a proceeding between the parties, carried on publicly, under the forms which the community oversaw.[370]

A trial was public, not just in the modern sense that it was *open* to the public, but in the sense that it was a *communal event*, a religious as much as a legal ritual, theatre as much as court, drama as much as law.

The oath, to which I now return, was the dramatic centrepiece of a medieval trial. The myth of conclusive proof was embodied in the oath. It was even more dramatically present in two other kinds of medieval trial. One was trial by battle,[371] of which

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[367] Holdsworth, p. 336.

[368] As Manuel does on Faulty Towers.

[369] That form, as I pointed out above, is changing.

[370] Thayer, p. 8-9.

[371] Holdsworth lists *four* forms of proof. In addition to compurgation or wager of law (oath), battle and ordeal, Holdsworth lists trial by witnesses. (p. 299-311) He says: "Trial by witnesses has a modern sound; but such a trial meant in the twelfth century something very different from the trials of modern law. These witnesses were persons analogous not to our modern witnesses, but to the secta." (p. 302)

The "secta" were witnesses, as opposed to proof, produced at trial. At trial, a party making a complaint or a defence was required to produce a secta to swear to its validity. The secta was a formal part

Holdsworth says: "The trial by battle is the *judicum dei* par excellence."[372] God decides who wins. No proof could be more conclusive.

The other kind of medieval trial that produced conclusive proof is the trial by ordeal. I do not discuss trial by battle. I will come back to the medieval English trial by ordeal after we have looked at two forms the myth of conclusive proof took in ancient Greece. The oath-challenge and the *basanos*-challenge.

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of the pleadings and until 1852 the plaintiff's opening pleading in a case "always concluded with the words 'et inde produit sectum'." (p. 301)

When witnesses were offered as proof, Holdsworth says the plaintiff and the defendant produced a secta (Holdsworth uses the same word) "to swear to a belief in his tale" (p. 302) and [a]ccording as the court considered the one or the other secta to be more credible, so the case was decided. But it would seem that the credibility of the plaintiff's and defendant's bands of witnesses was decided in primitive times and much later, by simply looking to see if they all told the same tale and by counting their heads." (p. 302)

I cannot understand Holdsworth's account of trial by witnesses. I cannot figure out whether credibility mattered or did not. In one place Holdsworth says the secta did not "tell a tale", they swore to a belief in the plaintiff or defendant's tale, while in another place, he says the members of the secta had to tell the same tale.

Thayer also discusses trial by witnesses (p. 17-24). I cannot understand his account either. He says it was "one of the oldest kinds of 'one-sided' proof"" (p. 17), but on the same page, he says "he who suspects that witnesses produced against him are false may bring forward counter-witnesses". I cannot square these two statements and I cannot square Holdsworth's statement that if the two sets of witnesses disagreed the court "counted heads" with Thayer's statement that "if the two sets differ hopelessly, the only solution of the difficulty that offers is to have witnesses from each side fight it out together". (p. 17)

Apparently even Thayer had some difficulty understanding trial by witnesses, for he said, "the separate notions of the complaint *secta*, the fellow swearers, the business witnesses, the community witnesses, and the jurors of the inquisition and assize run together" and the Norman law "shows the same breaking up and confusion as regards this sort of trial which we remark in England". (p. 18)

In any case, in so far as I do understand Holdsworth's and Thayer's accounts, I do not see trial by witnesses, which, of course, is what grows into modern proof, as an appeal to God. Holdsworth does not say it is that, whereas he does say trial by battle is an appeal to God. Trial by witnesses does not seem to be an appeal to human rationality either, however.

> As late as 1560 in the case of *Thorne* v. *Rolff* (Dyer 185) an issue as to the life or death of a woman's husband was tried in this way. The plaintiff brought two witnesses, the defendant none; and though it was admitted that "their testimony tended to no full proof," it was held that the plaintiff must recover because "the better proof" must win the day. (p. 303)

This is precisely the point I make about balance of the probabilities in Lecture II, except here we are talking strictly numbers and not credibility.

[372] Maitland says, "The common modes of proof were oaths and ordeals. (p. 15) Holdsworth discusses trial by battle at p. 308-310 and says:

> Trial by battle is almost universally found among the barbarian tribes from whom the nations of modern Europe trace their descent. It was not merely an appeal to physical force because it was accompanied by a belief that Providence will give victory to the right. Christianity merely transferred this appeal from the heathen deities to the God of Battles. (308)

The Oath-Challenge in Ancient Greek Law

Unlike Medieval England, Classical Greece is easy to date and locate. When we talk about classical Greece we mean Athens in the 5th and 4th centuries BC. This was the height, the flowering of Greek culture, and Athens was the centre of it. It was not the only city-state (*polis*) in Greece at the time and many of the other city-states are interesting in their own right. Sparta, for instance, which was strong enough to defeat Athens in the Peloponnesian Wars (431-421 and 415-404), is particularly interesting. But when we speak of Greek law, we mean now, as they did then, Athenian law.

Athenian law has some superficial similarities to both medieval English law and modern law. In all three, for instance, we find juries and oaths. As we will see, the forms of these institutions differ so much, that this similarity is at least partly superficial, but some of the similarity goes pretty deep. For instance, the progenitor of the New England town meeting used by Thayer to describe the medieval English court was the Athenian assembly. Athens had a very "pure" form of democracy, more "participatory" and less "representative" than anything since.[373] In Athens, *all* public decisions were made by an Assembly, to which *all* Athenian citizens belonged.[374] Public officials changed yearly and for the most part were selected by lot. Everyone was charged with the duty to uphold the law and public duties were enforced by litigation between private individuals.

Greek juries were an extension of popular Greek democracy and the most striking feature from a legal point of view about Greek Law is that there were *no lawyers* and *no judges*.[375] Litigants argued personally before juries, composed of a minimum of 101 fellow citizens (in private cases) and up to 1001 (in public cases). A trial before a large Athenian jury, addressed directly by the litigants, was public in the same way a medieval English trial was. It was a communal event.[376]

As in a medieval English trial, so in an ancient Athenian trial, it was possible to swear an oath that was conclusive proof. The procedure of the Greek oath was different,

[373] This is one of the reasons, the Athenians are said to have "invented" democracy. See above, n. 351.

[374] Citizens were only male of course. Women had no political rights and neither did slaves. Those without political rights made up the majority of the population.

[375] A few of the oldest Greek courts had judges, but the ordinary courts in classical (i.e. 4th and 5th century) Athens had no judges, only juries. Perhaps it was the absence of lawyers and judges that made it possible to have a rule that every trial had to be completed in one day.

[376] It is rare for a modern court to be communal in this way, but as the trial of O.J. Simpson demonstrated, it can happen, at least in a metaphorical sense. What was so unsetting about the trial of O.J. Simpson, was the public perception among reasonable people that the verdict was not correct. People thought Simpson probably was guilty. The jury said they had some doubt about his guilt because they had *no* doubt the policemen who investigated the crime were racists. No doubt about one thing meant reasonable doubt about something else.

however.[377] In medieval English law, the *judges* decided who swore the oath; in Greek law, there were no judges, so the *parties* decided. Either party in an Athenian trial could offer to swear an oath or challenge his opponent to swear one. The first recorded instance of such an oath-challenge comes near the end of Homer's **Iliad**.[378]

In Book XXIII of the **Iliad**, Achilles stages funeral games for the death of his friend Patroklos. One of the competitions is a chariot race. The race is won by Diomedes; Antilochos finishes second and Menelaos, third. In his description of the race, Homer tells us Antilochos cut in front of Menelaos, who had to pull up to avoid a collision. When it comes time to award the prizes[379] and Antilochos rises to accept the prize for second place, Menelaos jumps to his feet, grabs a spear and yells, "You fouled my horses by throwing your horses in their way."[380]

This is the prototypical situation in and for which people develop law. Both men want something only one can have, and they have been away from home, fighting a war, for ten years. They are not inclined to be civil. One actually brandishes a spear. This is going to wind up in a blood bath. Only it does not. Law is invented. Instead of attacking Antilochos, Menelaos calls on the assembled Greek leaders to "judge between the two of us" (l. 574) and then, suddenly, he has an even better idea! "Or rather, come," he says, "I myself will give the judgment." (l. 579) Menelaos stands tall, his spear poised beside him, and says, "This is justice. Stand in front of your horses and chariot, and in your hand take up the narrow whip with which you drove them before, then lay your hand on the horses and swear by him who encircles the earth and shakes it you used no guile to baffle my chariot." (l. 581-85)

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[377] Just as the procedure of the modern oath is different from both the procedure of the Athenian and the Medieval English oath.

[378] The **Iliad** was composed two or three hundred years before classical Athens and refers to events" that occurred five hundred years before that.

[379] Book XXIII, lines 260-7. 1st prize is "a woman faultless in the work of her hands to lead away and a tripod with ears." 2nd prize is "a six-year old unbroken mare who carries a mule foal within her." 3rd prize is "an unfired cauldron which held four measure, with its natural gloss still upon it." 4th prize is "two talents worth of gold" and 5th prize is " an unfired jar with two handles." These prizes are supposed to go in descending order and of course, by the values of the time, they did, but however much two talents of gold was worth back then, the modern equivalent wouldn't come close to buying an unfired Greek jar from 1200 B.C., even with one of the handles broken off. That it was ancient Greek gold would give it some extra value, especially if it were in coins. But if it were uncoined gold, I think it would need a certificate proving it was ancient Greek. Maybe I am wrong about this, however. Maybe they can tell when gold was mined.

[380] Book XXIII, lines 571-2, R. Lattimore, trans. (Chicago, 1951). David Mirhady, Professor of Humanities at Simon Fraser University, has suggested to me in conversation that this should be seen as bluster by the chief king and that Antilochos' deferential rejection of the prize is prudential or wise, as befits the son of Nestor. Once Antilochos gives up second place, the mollified Menelaos gives him gifts worth more than the prize. I could not have written this lecture without either David's help, or the course in Greek Law I took from Phillip Harding, Professor of Classical Studies at UBC, and the many discussions that followed it.

Menelaos issues a *challenge* to Antilochos. That is what a lawsuit is: a challenge (an *agon* in Greek, a fight or struggle) only *with oaths instead of fists*. This is trial by battle becoming trial by oath and we see in the **Iliad** one conclusive way for such a trial to end. Antilochos *refuses* to take the oath, and his refusal is dispositive of the dispute between him and Menelaos.

An oath is dispositive, whether it is taken or not.[381] Maitland said if the person swearing the medieval English oath and his compurgators "get safely through this ceremony, punctually repeating the right formula, there is *an end of the case*". Here the person challenged to take the oath does not take it, but we still get "an end of the case" – a disposition without bloodshed. This is what law seeks and one way to achieve it is with conclusive proof. When Antilochos refuses to take the oath, the trial is over. A winner has been decided. *Taking* the oath is dispositive and *failing* to take the oath is dispositive. It is a little awkward to talk about the failure or refusal to take an oath as "conclusive proof", but that is what it amounts to; that is its legal effect.

The refusal of a challenge-oath worked as conclusive proof to end the dispute in the **Iliad** and in the courts of Athens.[382] The Homeric form was still effective in the 4th century.[383] A challenge oath is referred to in a speech that has survived from a case

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[381] In Aeschylus' **Eumenides** Orestes is challenged by the Furies to take an oath that he did not kill his mother. He refuses because as far as he is concerned that is not the issue. Orestes *admits* he killed his mother; he says it was justifiable homicide, indeed, he says he was *required* to kill her because she killed his father. David Mirhady points out that the oath is not dispositive here. Over the objection of the Furies, who argue that the refusal to take the oath should be dispositive, Athena, the judge in the case, decides it is not, and renders judgment in Orestes' favour. Goddesses can do what they like.

It is interesting to consider Orestes claim in light of the discussion in Lecture III about insanity and eccentricity, p. 66-70.

[382] Another, non-Athenian example of a dispositive Greek oath can be found in the laws of a Greek community called Gortyn. A stone copy of the code of this *polis*, dating from about 450 B.C., contains the following procedure:

> If a husband and wife divorce, that which is her property she shall keep…. If anything else is taken by her from the husband, five staters shall be her payment and whatever she takes from him and whatever she purloins, she shall return. But as to those things she denies, the judge shall rule that the woman take oath by Artemis at the Amyklaian temple to the Archeress. Whatever someone takes away from her when she has taken oath, five staters shall be his payment and the thing itself.

The procedure envisioned here is that when a married couple divorces, the wife takes what she says is hers, but if the husband says she has taken something which is his, she has to return it, unless she denies that it is his. If the two parties disagree about whether a particular piece of property is his or hers, the judge orders the wife to take an oath and if she does, that ends the matter. The husband can no longer argue that the property was his. The wife's oath is conclusive proof that the property was hers. This oath is more akin to medieval oaths because it is ordered by the court.

[383] A.R.W. Harrison, **The Law of Athens – Procedure**, (Oxford, 1971), p. 150-153.

The challenge oath in the **Iliad** and the speech of Demosthenes I quote in the text are the *only* examples of challenge oaths in Greek literature. There are comments about oaths in other speeches, but these are the only two that can be documented. Despite the lack of evidence, classicists speak of the oath as if it were "a standard form".

Naturally, in my discussions of Greek law, I accept the conventions of classics scholarship, but as a law professor, I find it somewhat difficult to speak of anything in Greek law as having a "standard form."

actually litigated 2500 years ago. The speech was written by Demosthenes, one of the greatest Greek orators.[384] It refers to a challenge oath that came up in a case litigated in 347 BC. The case involved two men: Mantitheus and Boeotos. Unfortunately, only Mantitheus' speech has survived,[385] so the only record we have of *Mantitheus* v. *Boeotos* is the plaintiff's account of the facts:

> According to Mantitheus the facts are as follows. Mantitheus is the legitimate son of Mantias by the daughter of Polyaratus. Both during his marriage and after his wife's death Mantias kept a mistress, Plangon, by whom he had two sons, Boeotos and his younger brother Pamphilus, both born after Mantitheus. At least Plangon claimed they were Mantias' sons. However, Mantias steadfastly refused to believe that the children were his. When Boeotos came of age, he brought suit against Mantias to compel him to recognize Boeotos as his legitimate son. Mantias was unwilling to go to court, fearing that his political enemies might use the trial as a means to attack him. Accordingly, he made a private arrangement with Plangon … Mantias was to challenge Plangon to affirm on oath that Boeotos was his son. Plangon (for a payment of 30 *minae*) was to refuse the oath. But

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All the surviving literature of Greece is printed in 317 tiny little volumes in the Loeb Classical Library of Greek authors. This whole series takes up, generously speaking, five ordinary library shelves, and half of this doesn't count since each volume has Greek and English on facing pages. All the Greek literature we have fits on one CD-ROM, and with the exception of Aristotle's **Constitution of Athens** and his **Rhetoric**, none of the material is systematic. It is all bits and pieces, plays, poems, speeches, etc. I cannot even guess what people would make of our law if 2,500 years from now they tried to reconstruct it from Dickens, **Bleak House**, *Kafka's* **The Trial**, an episode or two of *Law and Order*, etc.

[384] As I pointed out before, there were no lawyers in classical Athens and the litigants spoke to the large juries themselves. But litigants, being what they are, sometimes sought help in preparing their speeches. Some of Demosthenes' surviving speeches are in cases where he himself was a litigant, some he wrote for other people and then circulated as examples of his skills.

One of Demosthenes' most famous speeches, *On the Crown,* comes from a case in which Ctesiphon, a supporter of Demosthenes, was sued for proposing in the Assembly that Demosthenes be given a gold crown as a reward for his service as a Greek statesman. When they left office, Greek officials were required to submit their accounts of their expenditure of public money. Demosthenes had not yet submitted his and it was an offence to propose giving a reward to an official who had yet to clear his account. Aeschines, a political opponent of Demosthenes, sued Ctesiphon. Though Demosthenes was not a "party" to the action, he was recognized as having standing to argue personally in the case.

Aeschines lost this case and he lost it badly. More than 80% of the jury voted against him, and in Athens, if you brought a *graphê*, that is a non-personal action to prevent a public wrong, and lost by more than 80%, you were *atimia*. Literally, this meant without honour; practically, it meant you could no longer bring suit or exercise the other rights of citizenship.

In a society where civil life was everything, this was civil death, and Aeschines left Athens after losing this case. He was still a famous orator, however, and when he established himself in a new city-state, he set up a school for oratory. A story lawyers can appreciate is told of what happened when, at his students' request, Aeschines repeated the speech he had given, *On the Crown*, before a large audience in an amptitheatre. When he had finished, a throng of his appreciative students approached and praised the speech. "How could the Athenians have been so foolish as to vote against you?" one asked. To which Aeschines is said to have replied: "Ah! You didn't hear Demosthenes."

[385] Classics scholars say this is because Demosthenes was so good.

> … Plangon broke her promise and swore that Boeotos and Pamphilus were Mantias' sons. Mantias' opposition collapsed, and he acknowledged them as his legitimate sons by enrolling them in the *phratry*[386] under the names Boeotos and Pamphilus.[387]

After Mantias died, Boeotos registered himself in Mantias' *deme* (the political unit of citizenship). He did not register under the name Boeotos, however. He registered under the name "Mantitheus, the son of Mantias of Thoricus." Mantitheus was the name of Mantias' father and it was traditional in ancient Greece for a man's eldest legitimate son to receive the name of his paternal grandfather. In light of the decision in *Boeotos* v. *Mantias*, Boeotos claimed to use the name.

Mantitheus sued.[388] He made two arguments:

1) I am older than Boeotos so even if he is legitimate, the name is rightfully mine, and
2) it makes no sense to have two men with the same name. I've been using the name "Mantitheus, the son of Mantias of Thoricus" since I was born. Surely in good sense and justice I should not be forced to give it up now, and take a new name.

A majority of the jury voted for Boeotos.[389] They decided not to stop him from using the name "Mantitheus, the son of Mantias of Thoricus". In some ways, the result seems compelled by Plangon's oath in *Boeotos* v. *Mantias*. Mantitheus was trying to relitigate a question that had already been *conclusively* decided.[390] Mantitheus did argue

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[386] A phratry was a brotherhood or social unit.

[387] C. Carey and R.A. Reid, eds. **Demostehenes: Selected Private Speeches** (Cambridge, 1985) p. 161. (Demosthenes 39).

Carey and Reid point out that Mantitheus' mother was the daughter of a very rich man and that Plangon's father "had been convicted of embezzlement and his property sold." (p. 160) Perhaps this played some part in Mantias' refusal to recognize them in the first place.

[388] We do not know exactly what order he sought because Greek Law was less concerned about orders than ours. Greek juries rendered verdicts; they did not grant orders. The verdict in this case would have been a lot like a declaratory judgment on who had the right to use the name.

[389] We do not have any systematic record of the *verdicts* in Greek cases. Indeed, we know the verdict in very few of the cases from which speeches survive. Sometimes we know who won a case because the verdict is referred to in a speech delivered in a later case and in this case that is the case. The verdict in *Mantitheus* v. *Boeotos I* is referred to in a speech which has survived from *Mantitheus* v. *Boeotos II*. I will have something to say about that case later.

[390] The first thing Mantitheus says in his speech against Boeotos is, "It was not from any love of litigation, I protest by the gods, men of the jury, that I brought this suit against Boeotos …" (39.1) but Mantitheus was *very* litigious, at least on this issue. After he lost the suit to stop Boeotos from using his name, Mantitheus sued Boeotos again to recover his mother's marriage-portion. This is *Mantitheus* v. *Boeotos II* in which Mantitheus essentially relitigates the same issue for a *third* time. Demosthenes wrote Mantitheus's speech in the second trial and it survived. (Demosthenes 40).

that he was older than Boeotos, but his argument on this ground was half-hearted, as if he himself did not believe it. What was really at stake in *Mantitheus* v. *Boeotos* was Boeotos' legitimacy and this issue had already been conclusively resolved by Plangon's oath.

It is important to understand that nothing was ever *conclusively* resolved in Greek law. Under Greek legal and political theory, it was always possible to relitigate a matter that had already been decided.[391] *In Athens there were no judges to take questions away from juries*.[392] The people were *sovereign*, and hence, a jury could decide whatever it chose to decide.[393] This is the whole point of Greek oratory and rhetoric. If you could persuade the jury, you won. Where a plaintiff was trying to relitigate a question which had already been decided in the defendant's favour, one would expect a jury to do just what the jury did in *Mantitheus* v. *Boeotos*: vote for the defendant. But in ancient Greek legal theory there was nothing to stop a jury, once it had heard the arguments of both sides, from voting in favour of a plaintiff who had lost the same case before.[394]

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[391] It is not clear whether, even in our day, Mantitheus would be precluded from relitigating the question of Boeotos' legitimacy. Since he was not a party to *Boeotos* v. *Mantias, res judicata* would not apply, though perhaps there would an issue estoppel. Below, I look at a modern case that is remarkably similar to *Mantitheus* v. *Boeotos II*. The case is called *The Ampthill Peerage* [1977] A.C. 547. For obvious reasons, I cannot say the two cases are "on all fours" but they are remarkably similar factually, legally and theoretically. Issue estoppel did not block that case from arising, though it did determine the outcome. See p. 134.

[392] For how this works in modern law, see Lecture II, p 26-8.

[393] On our legal theory, you cannot say a sovereign legislature has acted against the law (unless there is a constitution). Hence the old legal saw: no man's rights are safe while Parliament is sitting. Under our legal theory, it is still true that the decisions of court of highest jurisdiction cannot be said to be "against the law". Whatever the highest court says the law is, is what the law is.

[394] There is no evidence that in Athens a person could sue twice for the same thing. This is a point of pure theory about the relationship of judges and juries.

The theoretical ability to "relitigate" decided questions can be seen in the famous debate described by Thucydides in Book Three, Ch. 3 of **The Peloponnesian War**. Mytilene, a city-state tied to Athens, had revolted during the war with Sparta and made overtures to join Sparta. When Athens reconquered Mytilene, the Athenian assembly voted to punish Mytilene by killing all the adult males and enslaving the women and children. A ship, bearing orders to this effect for the Athenian commander, was dispatched to Mytilene, but "next day, there was a sudden change of feeling" and the assembly considered the question again. Strictly speaking, this debate was not a "trial", but it was treated as akin to a trial by Cleon, who warned the assembly to be wary of an orator who "will struggle to persuade you that what has been finally decided was, on the contrary, not decided at all." R. Warner, trans. (Penguin, Baltimore, 1954) p. 182.

> I am amazed at those who have proposed a reconsideration of the question of Mytilene, thus causing a delay which is all to the advantage of the guilty party. After a lapse of time the injured party will lose the edge of his anger when he comes to act against those who have wronged him; whereas the best punishment and the one most fitted to the crime is when reprisals follow immediately. p. 181.

In our own courts, it is not impossible for a court of appeal to reverse a jury verdict. It is certainly harder than reversing the decision of a judge, but the verdict of a modern jury can be said to be against the law or against the weight of the evidence. An appelate court can reverse a jury verdict on the grounds that the judge misdirected the jury or that the jury *must have* disregarded the instructions of the judge. Reversing a jury on the final ground is like deciding that, on the evidence, the case should not have been

In *Boeotos* v. *Mantias*, Mantias challenged Plangon to swear an oath that she was married to him and that Boeotos was his son. When she swore this oath, Mantias was forced to admit the marriage and the legitimacy of Boeotos. This shows the conclusive nature of the oath, but it shows something more as well. In *Mantitheus* v. *Boeotos*, Mantitheus argued that Plangon's oath was a *fraud*. He said that before Mantias challenged Plangon to take the oath, he had paid her to refuse to take it and that instead of doing what she had been paid to do, refuse the oath, Plangon had welched on the deal and sworn the oath.

That an oath was sworn because of a fraud did not matter in Greece.[395] For the Greeks, oaths were an almost-physical fact.[396] Whether sworn falsely or truly, once an oath was sworn, it was sworn. It could not be taken back or changed and neither could the legal result that depended on it. This is the point of the Biblical story about the Isaac and Jacob. With his mother Rachel's assistance, Jacob, Isaac's second son, covered his hands with lamb's skin and brought a dish of food to his father. When Isaac touched Jacob's hands he *thought* he was touching the hands of Esau, his first-born son, and he gave Jacob the eldest son's blessing (primogeniture). When Esau came in later and asked for his blessing, Isaac realized he had given the eldest son's blessing to Jacob, but at this point, there was nothing he could do about it. The blessing had been given and that was the end of the matter. Once given, a blessing could not be taken back. Though he got it by fraud, the blessing was Jacob's. It was his conclusively, absolutely, irrevocably, irrefutably. Where an oath is conclusive proof, it is conclusive, whether sworn falsely or truly.[397]

Physically Conclusive Proof: Ordeals in Medieval England

An oath is a quasi-physical form of conclusive proof. Another way to create conclusive proof in medieval England was by the ordeal and there was nothing "quasi" about the physicality of an ordeal. An "ordeal" means a "painful experience" and pain is linked to proof in almost all the ordeals employed in medieval England. There was trial by fire, trial by hot-iron, trial by poison, trial by boiling water.

All the ordeals did not involve pain, however, and it is particularly interesting to compare the ordeal by boiling water with the ordeal by cold water.

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sent to the jury in the first place. One might say the appellate court was deciding *nunc pro tunc* not to submit the case to the jury.

On Greek legal theory, none of this was possible. One could not say a Greek jury's verdict was "against" the law. A Greek jury's verdict *could not be* against the law. This is at least part of what Sir Henry Maine meant by his comment on Greek law, quoted at p. 14 and 143.

[395] We will look at the effect of fraud again when we examine conclusive proof in modern law, p. 134.

[396] In this, they are similar to documents, which I discuss in Lecture III.

[397] Lord Browne-Wilkinson might refer to this as "hard-nosed" law, see above p. 50.

> The ordeal of boiling water … is the one usually referred to in the most ancient texts of laws.… A cauldron of water was brought to the boiling point and the accused was obliged with his naked hand to find a small stone or ring thrown into it; sometimes the latter portion was omitted, and the hand was simply inserted, in trivial cases to the wrist, in crimes of magnitude to the elbow, the former being termed the single, the latter the triple ordeal…".[398]

The hand was then wrapped and after three days, it was examined. A person who had been burned was guilty, a person who had not, was not guilty.[399]

One parallel to note between ordeals and oaths is that they could both work in two directions. *Taking* an oath was conclusive proof; *failing* to take one correctly or *refusing* to take one when challenged was also conclusive proof. Ordeals worked in two slightly different directions. The ordeal of boiling water required a miracle to *acquit* but the cold-water ordeal required "a miracle to convict the accused, as in the natural order of things he escaped".[400] In the cold-water ordeal, the accused was bound and lowered into a pond or reservoir of water, "with a rope, to prevent fraud if guilty, and to save him from drowning if innocent".[401] The theory of the cold-water ordeal was that water, being a pure element, would reject the body of the guilty. One who floated was convicted, while one who sank was acquitted. This ordeal was used particularly with charges of witchcraft.[402]

The Basanos-Challenge in Ancient Greek Law

In ancient Greece, there were two forms of conclusive proof: the oath challenge and the *basanos*-challenge. *Basanos*, the most peculiar feature of classical Athenian law,[403] is the testimony of a slave, extracted under torture. Like women, slaves could not appear as either parties or witnesses in Athenian courts, "but a statement which a slave, male or female, had made under torture (*basanos*) could be produced as evidence".[404] M. Gagarin describes the process:

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[398] H.C. Lea, **Superstition and Force**, (Philadelphia, 1878), p. 244. Hereinafter "Lea".

[399] When Thayer spoke of the "privilege" of proof, I don't suppose he could have had this ordeal in mind.

[400] Lea, p. 279.

[401] Lea, p. 280.

[402] From it we get the phrases "swimming" or "ducking a witch".

[403] *Basanos* is peculiar in the sense that it is unique to Athenian law and in the sense that it is curious. The word *basanos* is used for both the torture of the slave and the testimony produced under torture.

[404] D.M. MacDowell **The Law in Classical Athens**, Ithica, 1978, p. 245.

> If a litigant wanted to introduce the evidence of servants[405] into court, he first issued a challenge offering his own or requesting his opponent's slaves for interrogation; slaves belonging to third parties were rarely proposed. The challenge would give specific details about when and where the interrogation would occur and exactly what questions would be asked. The slave's testimony was limited to giving yes or no answers to questions, and these answers could apparently be cited later or read aloud in court. The challenge was regularly written down and observed by witnesses. The other party could accept or reject the challenge, or accept it with modifications, or make a counter-challenge involving different slaves or different conditions. When the two parties had reached an agreement, the slave was normally interrogated in the owner's presence by the litigant who was not his owner ….[406]

Forty-two such challenges are referred to in the surviving literature, but "we do not have a single instance where the interrogation was actually carried out".[407] In *every* case the challenge to *basanos* was ultimately refused[408] as it was, for instance, in the following example:

> Since, I knew, men of the jury, that immediately after the trial Onetor had received the goods from Aphobos's house and taken over all his and my property, and since I was well aware that the woman was living with Aphobos, I asked Onetor to hand over three slave-women, who knew that the woman was living with Aphobos and that the goods were in their hands, so that there might be not only allegations but *basanoi* on the subject. But when I made that challenge, and everyone present declared that what I said was right, he refused to have recourse to that test.[409]

From the fact that there is *no* instance in which a *basanos*-challenge was accepted, Gagarin draws the conclusion that the point of *basanos* was to *make* the challenge, not to torture the slave: "*Basanos* does not designate a hypothetical procedure for interrogating a slave under torture, but a forensic procedure for introducing a slave's presumed

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[405] Gagarin has a footnote at this point, which says: "In almost all cases the slave in question is a household or personal servant."

[406] M. Gagarin, *The Torture of Slaves in Athenian Law*, 91 Classical Philology 1, 4 (1996). Hereinafter "Gagarin".

[407] Id. I cannot refrain from expressing the doubts I raised earlier. In light of the fact that "we do not have *a single instance* where the interrogation was actually carried out," I am at a loss to understand how Gagarin can assert that the challenge was "*regularly* written down and observed by witnesses."

[408] S. Todd, *The Purpose of Evidence in Athenian Courts*, in P. Cartledge, P. Millett & S. Todd, eds. **Nomos: Essays in Athenian Law, Politics and Society** (Cambridge, 1990) p. 33-4.

[409] Demosthenes 30. 35.

testimony."[410] Gagarin calls *basanos* a "legal fiction", and cites Sir Henry Maine as the first to note the importance of legal fictions.[411] This is an interesting and instructive point, but Gagarin misconstrues the idea of a legal fiction, and thus ignores the mythical function of *basanos*. I will examine legal fictions and then return to *basanos*.

Legal Fictions

A legal fiction, according to Sir Henry Maine, "conceals or affects to conceal, the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified".[412] A classic example of a legal fiction is the "casual ejector", a completely fictitious person, whose existence was asserted by plaintiffs in order to give the king's court jurisdiction to hear their cases. Everyone knew the assertion was fictitious but the defendant was not permitted to deny it. The assertion of the existence of the casual ejector was part of change that was occurring in English law. The change could not be acknowledged because it was part of the process by which the king's court was taking jurisdiction away from the local courts.

Plaintiffs' choice is the mechanism by which jurisdiction is taken from the local courts and transferred to the king's court. The procedures and modes of proof in medieval English courts were changing at the same time new writs were being created. The newer writs contained procedures advantageous to plaintiffs, and plaintiffs wanted to use them. To see why it is necessary to notice that while the new writs were being created *in* court, the world was changing *outside* court. At the start of the medieval period land tenure is primarily feudal. In exchange for the services one owes one's lord, one *owns* the land in freehold. Over the course of the Middle Ages, a new form of tenure was developed: *leasehold*, and a new writ, the writ of ejectment was created to deal with the rights of leaseholders.

"The action of ejectment was an action of trespass. Therefore the …. process in it was speedy compared with that of the real actions."[413] Owners wanted to use the new speedy writs that had been developed for renters. But an owner could not prove the claim to be a leaseholder, so a fiction was developed. In cases where freehold title was in dispute, plaintiffs began to allege, not that they *owned* the land and had been disseised, but that they have made a lease to someone, who has been ejected by a "casual ejector". If the owner sued on his own, he had to use novel disseisin, an old writ. The owner claimed to be suing in the lessee's name, to vindicate the lessee's rights. This gave him the chance to use the writ of ejectment.

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[410] Gagarin, p. 13.

[411] Id. at p. 1, n. 4.

[412] **Ancient Law**, p. 22.

[413] Holdsworth, Vol. VII, p. 7.

The lease, the casual ejector and the nominal plaintiff were all fictitious. Everyone knew these allegations were false, but defendants were not permitted to deny, or as it was said, "traverse" them. The courts expressly endorsed the fictions *as fictions*. In *Aslin* v. *Parkin*, an objection to the use of the fictions was raised before Lord Mansfield, who reserved the point and said he would put the question "to all the judges" and "endeavour to get their opinion without any delay or expense to the parties".[414] The unanimous opinion of the judges was

> that the nominal plaintiff and the casual ejector are judicially to be considered as the fictitious form of an action … invented under the control and power of the court, for the advancement of justice … and to force the parties to go to trial on the merits, without being intangled in the nicety of pleadings on either side.[415]

Apophugon – A Legal Fiction in Classical Athens

A true example of a legal fiction in Athenian law occurs in regard to the manumission of slaves. A freed Athenian slave had "a special relation to his former master".[416] The former slave still owed certain duties to the former master, probably agreed on at the time the slave was freed. These might have included the making of periodic payments from the former slave's wages. For a breach of these duties, the former master could bring an action against the slave (*dike apostasiou*). If the former slave lost the suit, he went back to being a slave, but if he won, "he was freed forever from all duties to his former master".[417]

Early in the 19th century, lists engraved on stone were found in Athens. Each entry on these lists contained the name of a former slave, his residence and his profession, and each recorded that the former slave had dedicated a *phiale*, a gold cup worth 100 *drachmas*, to the city of Athens. Each entry also contained the word "*apophugon*", which means "runaway". For a long while, classics scholars could not explain these inscriptions. In 1901, M.N. Tod said he was "inclined to believe that the *phiale* was, to all intents and purposes, a registration fee paid to secure the inscription in a public place" of the result of a *dike apostasiou*.

> In Athens, there was no fixed form of manumission, and difficulties were constantly arising as to the real status of persons who claimed to be free: once the matter had been decided, and the result inscribed on the accounts of the treasurers of Athena there could be for the future no doubt and no

[414] 97 L.R. 501, 502, 2 Burr. 665, 666.

[415] Quoted in Holdsworth, Vol VII, p. 7, n. 9.

[416] M..N. Tod, *Some Unpublished 'Catalogi Paterarum Argentearum'*, Annual of the British School at Athens, (1901-2) Vol. VIII, p. 200.

[417] Id. at p. 200.

> dispute.… [I]t may well be as Mr. Bousanquet has suggested to me, that the action was not in all cases a *bona fide* one, that sometimes it took place by collusion.[418]

Tod and Bosanquet's explanation is now generally accepted. It is now thought that *all* the actions were collusive and the word "runaway" was a pure legal fiction. The former master charged the former slave with having run away, when everyone knew this was not what had happened. When the slave was acquitted of the charge, he was legally free and dedicated a "freedom cup" to have the fact recorded. Both parties, and doubtless the court as well (assuming there was an actual trial) were aware that the slave was not a runaway. The false accusation of running away and the acquittal of that charge became a form of manumission. The law changed, but the fiction made it possible to deny that any change had occurred.

Legal Fictions and Legal Myths

The *basanos*-challenge is not a legal fiction. If one party had asserted that the testimony of a slave had been extracted under torture, and even though there had been no torture, the other party had been precluded from denying the torture, that would have been a legal fiction. Similarly, if one party could have asserted, untraversably, that there had been a challenge or that the torture had been properly conducted, then *basanos* would have been a legal fiction. A legal fiction is the *untraversable assertion as true of something known by the court and all parties to be false*.[419]

Basanos is a legal *myth*, not a legal *fiction*. Legal fictions are falsehoods of convenience. Myths are not falsehoods. We are not even conscious of them. Myths are dramatic expressions of things people *wish* to be true. They are symbols and symbols are neither true nor false.[420] *Basanos* is a form of the same myth we have seen in oaths and ordeals. The myth is that there is a systematic way to produce conclusive proof.[421] This myth can be heard very clearly in another speech by Demosthenes:

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[418] Id. at p. 201.

[419] L. Fuller, **Legal Fictions,** (Stanford, 1967) p. 1.

[420] If there was a fiction in *basanos*, it was that slaves will always tell the truth under torture and never without torture. This was not a legal fiction, however.

[421] So far as I am aware, there is only one Greek source which suggests that a properly conducted *basanos* was not conclusive. In the **Rhetoric**, Aristotle explains the arguments to be used in court if a slave's testimony is against you.

> Torture is a kind of evidence and is thought to be trustworthy, because it is attended by a sort of compulsion. Here, too, it is easy to point out the available arguments. If the testimony extorted is in our favour, we must magnify its worth, and say that this is the only kind of evidence which is absolutely true. If the testimony is against us and for our opponent, we may refute it by saying what is the truth about torture generally, – namely, that, under compulsion, men are as likely to lie as to tell the truth, or lightly make a false charge in hope of a speedier release; and one should be prepared to refer to cases in point, which are known to the judges. I, xv, 26, 1377a. Jebb transl. (Cambridge U. Press. 1909).

> You consider *basanos* the most reliable of all tests both in private and public affairs. Wherever slaves and free men are present and facts have to be found, you do not use the statements of the free witnesses, but you seek to discover the truth by applying *basanos* to the slaves. Quite properly, men of the jury, since witnesses have sometimes been found not to have given true evidence, whereas no statements made as a result of *basanos* have ever been proved to be untrue.[422]

In Greek, *basanos* originally meant a touchstone, a dark stone, against which gold was rubbed to determine if it was pure.[423] P. du Bois describes how the word came to be used for the evidence of a slave extracted under torture and points out that in Sophocles' *Oedipus Rex*, the chorus twice uses "the word *basanos* to denote a wished-for instrument of proof, some sign from elsewhere that would relieve them from the burden of choice".[424]

Notice that it is not simply *torture* that produces conclusive proof; it is *legal* torture, i.e. torture under the appropriate procedural conditions. For *basanos* to be legally conclusive proof, a litigant had to have

1) issued a *basanos*-challenge which was accepted, or
2) accepted a *basanos*-challenge from his opponent, and
3) the *basanos* had to have been conducted, and
4) conducted properly.

The reason Gagarin wants to speak of *basanos* as a "*hypothetical* procedure for interrogating a slave under torture" is that in none of the extant sources is *all* of these conditions met. Indeed, there is only one source in which a slave was tortured to create evidence.[425] In a speech attributed to Antiphon, another well-known Greek orator,

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If you can argue that the jury should not accept the testimony of a slave extracted under torture, then it would seem such testimony is not conclusive.

But Aristotle's **Rhetoric** is famous for cataloguing every argument that *could* be made, and as I pointed out above (p. 118-9) there was *no* argument which could not be made to a Greek jury. Aristotle need not be seen as saying that *basanos* did not produce conclusive proof. All he is saying is that if a *basanos* results in testimony against you, you can make this argument.

[422] Demosthenes 30.36.

[423] P. duBois, **Torture and Truth**, (Routledge, 1991) p. 9.

[424] du Bois, p. 18-9. In one of the passages duBois quotes from *Oedipus Rex*, the chorus wants to see "the word proved right beyond doubt". The Greek for this is *orthon epos*: *orthon*, straight up; *epos*, the word. Because of the structure of Greek, this should be translated not as "the straight-up word" but as "the word, straight up". The best English equivalent is "proof positive", which is slightly different in feeling from "positive proof".

[425] Nobody doubts that the Greeks beat their slaves. What is at issue here is the use of torture, pursuant to a challenge from one litigant to another, to extract statements from a slave, which become evidence in the litigation.

Euxitheos argued that a jury should not accept the testimony of a slave, even though it was extracted under torture. He said the torture was not conducted as part of a *basanos*-challenge; the man who was prosecuting him for murder had simply seized (or bought) the slave and tortured him.

> The slave was doubtless promised his freedom: it was certainly to the prosecution alone that he could look for release from his sufferings. Probably both of these considerations induced him to make the false charges against me which he did; he hoped to gain his freedom, and his one immediate wish was to end the torture. I need not remind you, I think, that witnesses under torture are biased in favour of those who do most of the torturing; they will say anything to gratify them. It is their one chance of salvation, especially when the victims of their lies happen not to be present. Had I myself proceeded to give orders that the slave should be racked for not telling the truth, that step in itself would doubtless have been enough to make him stop incriminating me falsely. As it was, the examination was conducted by men who also knew what their own interests required. [426]

Euxitheos also said that the slave recanted his testimony and then was killed, and that a non-slave was tortured and did not implicate him, even under torture. This story questions the facts but it does not question the myth. Indeed, it *accepts* the myth completely. If I had been there, Euxitheos says, if the *basanos* had been properly conducted, we would have conclusive proof that I am innocent.

Torture and Ordeal

In 1893, J.W. Headlam suggested that *basanos* was "really a vicarious ordeal".[427] This suggestion "met immediate opposition and it has been rejected by those writing on Athenian law".[428] Even D. Mirhady, who seeks to "revive Headlam's thesis in a modified form",[429] objects to the characterization of *basanos* as a "vicarious ordeal". Mirhady says *basanos* "always appears as a way of eliciting truthful information".[430]

But that is exactly the purpose of an ordeal, and H.C. Lea says ordeal and torture are "virtually substitutes for each other".[431] Lea means this historically.[432] We must

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[426] Antiphon 5, 31-2, in K.J. Maidment, ed., **Minor Attic Orators**, (Harvard, 1941), Vol I, p. 183.

[427] *On the πρόκλησις εισ βασανον in Attic Law*, vii Classical Review 1, 5.

[428] D. Mirhady, *Torture and Rhetoric in Athens*, cxvi Journal of Hellenic Studies 119 (1996).

[429] Ibid.

[430] Id. at p. 122.

[431] Lea, p. 371.

remember that the ordeal was not just used in England, and torture was not just used in Greece. Both were used all over Europe,[433] but they were not used continuously and they were not used *at the same times*. Rather, they seem to *replace* one another. Torture is used first. Then it dies out and the oath is used. Then the oath dies out and torture reappears.

There was torture in Greece and Rome, but after the Romans, torture virtually died out.[434] It was replaced by the ordeal, which, as Lea notes in a funny story about a cold-water ordeal conducted in 1083, could be used vicariously:

> [D]uring the deadly struggle between the Empire and the Papacy … the imperialists related with great delight that some of the leading prelates of the Papal court submitted the cause of their chief to this ordeal. After a three days' fast, and proper benediction of the water, they placed in it a boy to represent the Emperor, when to their horror he sank like a stone.… [A] repetition of the experiment … was attended with the same result. Then throwing him in as a representative of the Pope, he obstinately floated during two trials, in spite of all efforts to force him under the surface …[435]

The ordeal lasted through the 12th century, but in the beginning of the 13th century, Pope Innocent III forbade the rites of the church to be used in the ordeal. This caused the ordeal to die out all over Europe. It is no coincidence, Lea says, that by the end of the century "the first faint traces of torture are to be found in France".[436] Torture does not catch hold in England, but everywhere else in Europe its use, not as a means of punishment, but as a technique for producing proof, grows until Civil Law winds up developing an elaborate set of rules about when torture can be used and what degree of proof it creates.[437]

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[432] Headlam meant his claim historically, too, but he meant it in the opposite direction. He meant that *basanos* was a survival from an older form in which the slave was tortured instead of the master. I don't know whether this is right or not. Long after *basanos* was gone, servants were required to undergo *legal* ordeals in place of their masters. Servants are still required to undergo physical ordeals for their masters. This is the nature of employment. It is what workers get paid for. See above Lecture IV, n. 296.

[433] This is apparent throughout Lea's book. He also makes the point that the ordeal was used for civil matters, not just criminal ones. The cold-water ordeal, for instance, was used "among the nobles of Southern German, as the mode of deciding doubtful claims on fiefs, and in Northern German, for the settlement of conflicting titles to land". p. 285.

[434] Torture, Lea says, "seemed destined to disappear utterly from human sight with the downfall of Roman power." p. 391.

[435] Lea, p. 285. Lea adds that "an oath was extracted from all concerned to maintain inviolable secrecy as to the unexpected results." Either the oath was breached or the imperialists made up the whole story.

[436] Lea, p. 421.

[437] See n. 49, 63, 362.

P. du Bois uses "torture and truth" as the title for her book about *basanos*,[438] but a better alliterative relationship is pain and proof. That pain, properly applied, can yield conclusive proof seems to be a feature of human subconsciousness and thus, there is no reason for classics scholars to be as embarrassed as they are about *basanos*.[439] The possibility that the classical Greeks, who produced such wonderful literature, philosophy, and art, could have tortured slaves to produce evidence for their masters' litigation upsets classics scholars deeply.

> To torture a person as punishment for an offence is logical, even if undesirable; to torture a person to make him confess an offense of his own or of an accomplice is understandable, though deplorable; but to torture an innocent man or woman in order to check the truth of information about someone else's offense appears to us an act of wanton and purposeless barbarity. And it is not even an effective way of discovering facts….[440]

How, classics scholars ask themselves, could a culture like the one we have spent our lives studying, a culture so graceful and literate and insightful, have included a practice so morally distorted and so obviously useless?

This question misunderstands the mythical role of *basanos*. When we ask whether *basanos* really happened, what its legal effect was, whether people actually believed in it and how they could have, if they did,[441] we might as well be asking whether Menelaos actually challenged Antilochos to take an oath as proof positive that he had not cheated, whether this oath, if Antilochos had taken it, would really have been dispositive of the dispute, and how people could put any faith in self-serving oaths anyway. Reality and actual consequences are not at issue in myth, and moral absurdity, far from undercutting myth, seems, unfortunately, to be essential to it.[442]

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[438] **Torture and Truth**, (Routledge, 1991).

[439] No more reason, that is, than for any of the rest of us. The subconscious relationship between pain and proof is not something any of us can take much pride or pleasure in.

[440] D.M. MacDowell, **The Law in Classical Athens**, (Ithaca, 1978) p. 246.

[441] Of course, the mythic function of the torture does not affect the moral point: it is awful to torture anyone and duBois, p. 52, makes the point that in Athens, torturing slaves helped to maintain the distinction between citizens and slaves, by dramatically highlighting the fact that citizens could *not* be tortured.

[442] The more "classical" a culture, the more bizarre the myth. It is clear the Greeks tortured their slaves, but on the evidence, it is hard to tell whether they did so to create conclusive proof in suits between citizens. There can be absolutely no question that torture and ordeals were widely used in the Middle Ages. This less sophisticated culture needed the actual stage props to sustain the myth.

The Myth of Conclusive Proof in Modern Law[443]

A modern example of the myth of conclusive proof can be found in a case decided in the House of Lords in 1976.[444] The case is remarkably similar to *Mantitheus* v. *Boeotos*. In 1918, the third Baron Ampthill married Christabel Hulme Hart. In 1921, Lady Ampthill gave birth to a son, Geoffrey Russell. The Baron did not believe the child was his, and in 1923, he petitioned for the dissolution of his marriage to Lady Ampthill on the grounds of her adultery. The case was tried before a jury.[445] Lady Ampthill denied the charge of adultery but Baron Ampthill testified that while he and Lady Ampthill had engaged in sexual relations, they had never had intercourse with penetration.[446]

The jury found for the Baron and the marriage was dissolved. Lady Ampthill, however, did not give up the fight. She appealed the trial decision to the Court of Appeal, which sustained. Again she appealed, this time to the House of Lords, which held that evidence of non-access by a husband could not be admitted in a divorce proceeding where it would have the effect of bastardizing a child born during wedlock.[447] The decree *nisi* of divorce that had been granted was rescinded, and a second trial was ordered. At this trial, the Baron's testimony was inadmissible and, on the issue of adultery, the jury found for Lady Ampthill. The Baron's petition for divorce was accordingly denied.

Soon after the second trial, since the Baron refused to admit paternity, the then four-year-old Geoffrey Russell's maternal grandmother, as his guardian *ad litem*, presented a petition for a declaration of legitimacy. The judge who heard the petition said,

> On the evidence before me I am satisfied that the petitioner has made out his case.… Mr. John Russell [the third Baron] sought to reopen the question determined by the House of Lords in his petition for divorce. Manifestly that could not be done. Therefore I decree and declare that the petitioner, Geoffrey Denis Erskine Russell is the lawful child of his parents, the Hon. John Hugo Russell and Christabel Hulme Russell.[448]

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[443] Lawyer may find my treatment of modern law overly selective and abbreviated. Please bear in mind that I am not trying to say anything about legal doctrine. I use these examples to say something about the myth of conclusive proof.

[444] *The Ampthill Peerage* [1977] A.C. 547.

[445] The case was a *cause célèbre*. The newspapers could not get enough of it.

[446] Evidence was also introduced that nine months before the birth of her son, Lady Ampthill, who seems to have been an early hippie, had gone to France on vacation with another man and shared a room with him.

[447] *Russell* v. *Russell*, [1924] A.C. 687.

[448] Quoted id. at p. 567.

The Baron and Lady Ampthill did not live together after this and in 1937, their marriage was dissolved by divorce. In 1948 the Baron remarried, and in 1950 his second wife gave birth to a son, John Russell. In 1973, when the third Baron Ampthill died, John petitioned the House of Lords, asking that before Geoffrey be recognized as the fourth Baron Ampthill, he be required to give a blood sample, to be tested for type with a sample that had been taken from the third Baron before he died.[449] He argued that the declaration of legitimacy was not binding on the House of Lords in a peerage claim and that it had been obtained by fraud and collusion.

The Committee for Privileges of the House of Lords heard the petition in the first instance. The same Law Lords sat as would have sat on an appeal and gave a unanimous decision in favour of Geoffrey. In his judgment, Lord Wilberforce spoke extensively of the *Legitimacy Declaration Act, 1858*. In language even more pointed than that used in the *Adoption Act* quoted above, it provided that a declaration of legitimacy was "binding to all intents and purposes … on all persons whomsoever", but it also provided that a declaration was not binding "if subsequently proved to have been obtained by fraud or collusion." Lord Wilberforce went on to say,

> There can hardly be anything of greater concern to a person than his status as a legitimate child of his parents …. It is vitally necessary that the law should provide a means for any doubts which may be raised to be resolved…. It is vitally necessary that any such doubts once disposed of should not be capable of being reopened…. English law, and it is safe to say, all comparable legal systems, place high in the category of essential principles that which requires that limits be placed upon the rights of citizens to open or to reopen disputes.… Any determination of disputable fact may, the law recognizes, be imperfect; the law aims at providing the best and safest solution compatible with human fallibility and having reached that solution it closes the book.… [T]here are cases where the certainty of justice prevails over the possibility of truth….[450]

The law "closes" the book". This is the principle of finality, but it is *not* the myth of conclusive proof. Lord Wilberforce says Geoffrey's legitimacy must be *taken* to have

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[449] This was not a DNA test, just a test of blood types. The court rejected the use of this test on the basis explained in the text, but said, in *obiter*, that the test would not have been conclusive because the Baron's blood sample had been in the possession of one of the parties, and in any case, science had not progressed sufficiently for blood tests to be conclusive. Lord Wilberforce went on, in still further *obiter*, to make the following prescient comment:

> One need not perhaps, on this occasion face the question, whether, when technology or science makes an advance, so as to enable to be known with certainty that which was previously doubtful, such evidence ought to be admitted to destroy the binding force of a judgment or of a declaration with statutory force. It may be that within the limits within which a new trial may be ordered and, on the precedents, those limits are comparatively short, such evidence could be admitted for that purpose. Id at p. 573.

[450] Id at p. 568-9.

been conclusively proven, but he does not say it *has* been conclusively proven. On the contrary, Lord Wilberforce expressly *denies* the possibility of conclusive proof. He says "*any* determination of disputable fact may be imperfect".

And yet, there is in this judgment an assertion of the myth of conclusive proof. It is hidden away and appears, not in the discussion of the proof of Geoffrey's legitimacy, but in the discussion of the proof of fraud. Of this Lord Wilberforce says, "anyone wishing to attack a judgment on grounds of fraud must … be prepared to prove what he alleges and ultimately must *strictly* prove it".[451] What does the word "strictly" mean? In a court of law, every allegation that is not admitted must be proven. How is proving something "strictly" different from proving it"? The idea that a particular sort of allegation can be "strictly" proven is the myth of conclusive proof.[452]

Legal Rules and the Myth of Conclusive "Proof"

Modern law converts as many questions of fact as possible into questions of law, thus converting the myth of conclusive proof into the myth of conclusive "proof". An example of this is the *Land Title Act*,[453] which defines the phrase "indefeasible title" as "a certificate of indivisible title",[454] and provides that:

> 23(2) An indefeasible title … is *conclusive evidence* at law and in equity … that the person named on the title is indefeasibly entitled to an estate in fee simple to the land described in the indefeasible title…. (emphasis added)

What the act actually means is that a certificate of title determines ownership *as a matter of law*. The *raison d'être* of title registration is to settle questions of land ownership definitively *without* having to make difficult decisions about facts and proof. This is the whole point of the Torrens System.

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[451] Id. at p. 571 (emphasis added).

[452] Myths are characteristically stated and restated and in his judgment, Lord Wilberforce uses the word "strictly" twice. The other occasion for the word is when he likens upsetting a judgment on the grounds of fraud to extending a limitation period.

> … limitation periods may exceptionally be extended. But these are rare exceptions to a general rule of high importance, and as all the cases how, they are reserved for rare and limited cases, where the facts justifying them have been strictly proved. p. 569.

This use demonstrates that in speaking about fraud being proven "strictly", Lord Wiberforce is not adverting to the third standard of proof.

[453] R.S.B.C., 1996 Ch. 250. Once again I use the law of British Columbia. What I say would be true in substance, though perhaps not in detail of any Torrens jurisdiction, i.e., jurisidiction with a land title registry.

[454] This defintion harkens back to a point made in Lecture II about documents.

That the "conclusive evidence" in the Act is mythical is recorded immediately after the portion just quoted:

> … subject to the following:
>
> … (h) the right of a person to show that all or a portion of the land is, by wrong description of boundaries or parcels, improperly included in the title;
>
> (i) the right of a person to show fraud, including forgery….

No legal rule is ever totally conclusive. All legal rules are subject to exceptions. The use of the word "evidence" in the *Land Title Act* is technically incorrect. The use of the word "conclusive" is part of a myth. The myth is the same as the myth of conclusive proof but it has been moved. I acknowledge the movement by putting quotes around the word "proof", but otherwise I ignore it.

Until recently the *Adoption Act* provided that "*For all purposes* an adopted child becomes on adoption the child of the adopting parent, and the adopting parent becomes the parent of the child, as if the child had been born to that parent in lawful wedlock." (Emphasis added.)[455] The myth of conclusive "proof" is expressed here in a different linguistic form, but to establish a fact "for all purposes" is to "prove" it conclusively. This was mythical because if an adopted child had sought to marry a natural sibling, this would not have been allowed. The *Adoption Act* has been amended to make this clear. Section 37 of the new act says,

> (1) When an adoption order is made,
> (a) the child becomes the child of the adoptive parent,
> (b) the adoptive parent becomes the parent of the child, and
> (c) the birth parents cease to have any parental right or obligations with respect to the child, except a birth parent who remains under subsection (2) a parent jointly with the adoptive parent.
> (2) If the application for the adoption order was made by an adult to become a parent jointly with a birth parent of the child, then *for all purposes* when the adoption order is made,
> (a) the adult joins the birth parent as parent of the child, and
> (b) the child's other birth parent ceases to have any parental rights or obligations with respect to the child.
> (3) If a child is adopted for a second or subsequent time, the adoption order has the same effect on the child, on the new adoptive parent and on the former adoptive parent as it does on the child, on the adoptive parent and on the birth parents or parent under subsections (1) and (2).
> (4) Subsections (1) and (3) do not apply for the purposes of the law relating to incest and the prohibited degrees of marriage.

[455] S. 11(1) R.S.B.C. (1979) ch. 4, now R.S.B.C. (1996) ch. 5.

The phrase "for all purposes" was taken out of subsections (1) and (3) in deference to subsection (4). The phrase was retained in subsection (2), but it is still mythical. Nothing in law is so "for *all* purposes". Everything in law is subject to exceptions. Imagine the horrible possibility that an adopted infant were to suffer serious brain damage while lying face down in a puddle, unable to breath. If the adoptive parents had stood over the infant and simply watched, they would be liable in tort because they have a duty to help the child. A stranger, however, would not be liable because a stranger has no duty to help the child. Suppose a birth parent, knowing it is the birth parent, stood by and watched while the child struggled. Surely, it is not beyond the realm of possibility that, despite section 37((2)(b), a court would hold the birth parent liable in such circumstances.[456] Indeed, I think this result would be likely.

A third, non-statutory example of the myth of conclusive "proof" may be found in tort. When the driver of a delivery truck is sued for negligently causing an accident, the driver's employer, the owner of the delivery truck, may be sued vicariously.[457] If the driver admits to speeding at the time of the accident, that admission establishes negligence and normally, if the driver is found to have been negligent, the employer is vicariously liable. The driver's admission looks, therefore, like conclusive "proof" against the employer. But there is no such thing as systematically conclusive proof. Suppose the plaintiff were the wife of the driver and the driver had been notified shortly before the accident that his employment would end in a month. In such a case, the employer might well be able to argue that, while the negligence of the employee had been "proven", it's vicarious liability had not.

Estoppel

> An estoppel in our modern law has been defined to be "an admission, or something which the law treats as equivalent to an admission, of an extremely high and conclusive nature – so high and so conclusive that the party whom it affects is not permitted to aver against it or offer evidence to controvert it." It is clear from this definition that there is much in common between an irrebuttable presumption of law and an estoppel. In both cases, there is no need for further evidence; for the party to a litigation who can show that such a presumption exists in his favour, or who can show that his opponent is estopped, will win his case. Their effect is the same. The difference between them seems to consist in the fact that, while an irrebuttable presumption is in effect a rule of substantive law, to the effect that when certain facts exist a particular inference shall be drawn, an estoppel is a rule of evidence that when, as

[456] This gruesome hypothetical is reminiscent of Greek tragedy.

[457] Vicarious liability is not the same as *basanos*, but the two are obviously related.

> between two parties to a litigation, certain facts are proved, no evidence to combat these facts can be received.[458]

Holdsworth obviously had some difficulty with the difference between an estoppel and an irrebuttable presumption. He treats an irrebuttable presumption as a rule of *substantive law* and an estoppel as a rule of *procedural law* about the admissibility of evidence. Salmond's classic text on jurisprudence says:

> Substantive law is concerned with the ends which the administration of justice seeks; procedural law deals with the means and instruments by which those ends are to be attained. The latter regulates the conduct and relations of courts and litigants in respect of the litigation itself; the former determines their conduct and relations in respect of the matters litigated. Procedural law is concerned with affairs inside the courts of justice; substantive law deals with matters in the outside world.[459]

Salmond's distinction is important but misleading, because what goes on in court affects what goes on outside of court and *vice versa*. How likely it is that one will be found liable in tort and how costly it is to be found liable affect what people do and changes in what people do affect how likely it is that one will be found liable for doing it. Law is always substantive *and* procedural, not substantive *or* procedural. If one leaves aside the distinction between substance and procedure, Holdsworth's observation becomes clearer: an estoppel and an irrebuttable presumption have the same legal effect, and the effect is that of being conclusive.[460]

Holdsworth goes on to explain where estoppel comes from, beginning with a point we have already noticed:

> In the twelfth and thirteenth centuries cases were decided, not by a process of reasoning from evidence offered to the court, but by modes of proof selected by the parties or ordered by the court. In those days the matters relied on to create an estoppel were regarded as operating as modes of proof, which settled the case in much the same way as battle, compurgation or ordeal. Probably the earliest way of proving one's case by means of an estoppel, and therefore the earliest form of estoppel, is that which is known as estoppel by matter of record….[461]

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[458] Holdsworth, Vol. IX, p. 144.

[459] J. Salmond, **Jurisprudence** (1902) 577.

[460] Whether we should speak of them as being conclusive "proof" is a question I defer until the next section where it comes up again in even more graphic form.

[461] Holdsworth, p. 144-5.

One way to view the *Ampthill Peerage* is as an estoppel by record. The original form of the estoppel depends on the king's seal. "[M]atters solemnly recorded by the king's court must be accepted as proof".[462] This is the essence of Lord Wilberforce's opinion in the *Ampthill Peerage*.

I will not deal with the doctrine of estoppel in any detail. Lord Coke, the famous 17th century lawyer and judge, called this law "excellent and curious", meaning complicated, and "later lawyers have expressed doubts as to its excellence, and have spoken rather of its "absurd refinements".[463] To conclude this lecture, I wish to draw attention to one further and related form of the myth of conclusive "proof". It comes out of Holdsworth's point that estoppel began with the king's seal.

Autrefois Acquit and Autrefois Convict

Just as the king's seal created an estoppel or an irrebuttable presumption, so the fact that a party has been convicted or acquitted of a criminal charge creates an estoppel or an irrebuttable presumption. The person cannot be tried again. This is called "double jeopardy" in Common Law and "*non bis in idem*" in Civil Law. It is almost a principle of Natural Law that the fact of a prior conviction or acquittal is conclusive "proof" that no court has jurisdiction to hear the case again.[464]

In international law, this is called "comity". The mythological nature of this conclusive "proof" of lack of jurisdiction can be seen in the *Rome Statute of the International Criminal Court, 17 July 1998*.[465] Article 20 provides:

> 3) No person who has been tried by another court for [genocide, crimes against humanity or war crimes] shall be tried by the Court with respect to the same conduct unless the proceedings in the other court
>
> a) were for the purposes of shielding the person concerned from criminal responsibility …,
> b) Or otherwise were not conducted independently and impartially ….

[462] Holdsworth, p. 147.

[463] Holdsworth, p. 145.

[464] In treating comity, which is so clearly a question of law, as being about "proof", I am crossing the line between a question of law and a question of fact. In Lecture VI, I explain why I think this is justified in theory of legal proof.

[465] It can also be seen in J.E. Costa, *Double Jeopardy and Non Bis In Idem: Principles of Fairness*, 4 UC Davis J Int. L &Pol'y 181 (1998).

Conclusion

The shortest statutory provision I know is section 3 of the B.C. *Wills Act*: "A will is valid only if it is in writing". One cannot imagine a less equivocal statute than this one, and yet as every lawyer will immediately recognize, even it is not unequivocal. One can still ask what does "in writing" mean? If I videotape someone reciting his or her "will" and then have the "testator" and two witnesses scratch their names on the tape, is that "in writing"? Is it valid?

Legal proof and legal rules are often conclusive, but neither is *systematically* conclusive. Neither precludes argument. This seems obvious, and yet modern law treats legal rules as if they could be systematically conclusive. It treats legal rules the same way Greek and medieval English law treated oaths, ordeals, battle and *basanos*. We may pray for conclusivity in law and be grateful when we find it, but we cannot devise a legal technique that guarantees it.

Every legal system says it has found a way to do the impossible.

Lecture VI
Speculation on the Future of Legal Proof

There is a strong tendency to think about law in accordance with what Butterfield called the "whig interpretation of history".[466] We see law as if it were the *goal* of legal history and view the past, asking whether people or events were on the side of "progress" or against it. At the end of Lecture I, I quoted Sir Henry Maine's remark about Greek Law. It is hard to imagine a more whiggish interpretation of legal history.

> There are two special dangers to which law, and society which is held together by law, appear to be liable in their infancy. One of them is that law may be too rapidly developed. This occurred with the codes of the more progressive Greek communities, which disembarrassed themselves with astonishing facility from cumbrous forms of procedure and needless terms of art, and soon ceased to attach any value to rigid rules and prescriptions. It was not for the ultimate advantage of mankind that they did so, though the immediate benefit conferred on their citizens may have been considerable.[467]

As far as Maine was concerned, the law he saw around him, British law at the turn of the 20th century, was where law had been heading all along. It was the maturity of law, as Greek law was its "infancy".

Maine did not approve of Greek law. He thought that even if not having lawyers, judges and facts in issue conferred an "immediate benefit" on the citizens of Athens, it was not for the "ultimate advantage of mankind". That Maine thought there was a higher test on which to assess law than the immediate advantage conferred on citizens is remarkable. Even more remarkable is Maine's belief that he knew what was for the "ultimate" advantage of mankind. To know that, one would have to be standing at the *end* of time and there is a sense in which, when it comes to law, we all think we are standing at the end of time.[468]

Legal history almost inevitably embodies a whig interpretation because in law, history and justification run so much together. Law always contains the assertion that, at any given moment, it is, if not perfect, then, at least, as close to perfect as can be. Law

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[466] H. Butterfield, **The Whig Interpretation of History**, (G. Bell, London, 1931).

[467] **Ancient Law**, (1861), p. 61.

[468] Phillip Harding once remarked to me that lawyers think law "began yesterday". We think legal history began yesterday and ends today. Lawyers are interested in law as it is, not as it was or will be.

Law always says the law is as good as it can be.

cannot admit to an imperfection unless it is prepared to correct it.[469] This is because if law acknowledges an imperfection, it is *compelled* to correct it. That is the nature of law. When it is alleged that there is an imperfection in the law, a legislator must say,

1. So there is. It is hereby fixed, or
2. I am in opposition. If I were in the government I would correct that imperfection, or
3. I am in the government and I would correct it if there weren't too much opposition, or
4. It is an imperfection, but if it were changed, things would be worse. The law is not perfect, but it's as good as we can make it. To change the law so as to get rid of the imperfection pointed out, would entail creating more imperfection, or (what amounts to the same thing) would cost too much.

A legislator may not say, "That's wrong and it could be fixed, but I am not going to fix it." The idea of law does not permit such an answer to a legislator or a judge. If it is alleged that there is an imperfection in the law, a judge must say,

1. So there is. The law
   a. is hereby changed, or
   b. never was as it seemed. It was always as I now say it is, or
2. It is not within my power to remedy this imperfection. I am appointed, not elected. Only the legislature can remedy this particular imperfection, or
3. It only seems to be imperfect. If it were changed, things would be worse. The law is not perfect, but it's as good as we can make it.

The Rationalist Model

As we have seen, legal proof is a variable, not a constant. The jury began as a large assembly and became a small body. It was once a body that expressed facts the community knew. It is now a body that decides facts on the evidence of witnesses and documents.[470] If we wish to avoid the sin of whig interpretation, we must not think of legal proof as growing *to* us. We must think of it as growing *through* us. Legal proof has not reached the end of its development any more than law has. The jury is still evolving. We can see how, if we look at William Twining's "rationalist model of adjudication".

[469] My friend and former student, Tom Alpeza, says the fact that law is constantly changing proves it has never been perfect.

[470] Some things about proof have not changed. Proof was and still is a physical thing. It has been tortured out of some individuals and taken painfully from the body of others. Its physicality, though not its association with pain, is now embodied in the hearsay rule. If the jury cannot actually *see* the witness, the testimony is presumed to be inadmissable. The *aqua regia* of cross-examination cannot reach to the out-of-court declarant, who is reported to have said such-and-so. The only question one can examine on is "did he or she say it?" The only question one cares about is "is it true?"

1. The direct end
2. of adjective law [i.e. Procedural law]
3. is rectitude of decision through correct application
4. of valid substantive laws
5. deemed to be consistent with utility (or otherwise good)
6. and through accurate determination
7. of the true past facts
8. material to
9. precisely specified allegations expressed in categories defined in advance by law, i.e. facts in issue,
10. *proved* to specified standards of probability or likelihood
11. on the basis of the careful
12. and rational
13. weighing of
14. evidence
15. which is both relevant
16. and reliable
17. presented (in a form designed to bring out truth and discover untruth)
18. to a supposedly competent
19. and impartial
20. decision-maker …
21. with adequate safeguards against corruption
22. and mistake
23. and adequate provision for appeal. [471]

This is a marvelous analysis. Of course, there are points in Twining's model about which one might quarrel or with which one might quibble. For instance, one might prefer point 5 to say "deemed to be good (whether because consistent with utility or otherwise)", and one might well ask why it is *supposedly* competent" in point 18 but not *supposedly* adequate in point 21. But quibbles aside, Twining has the essence of law here. He has the idea down beautifully.

And yet there is something terribly wrong with Twining's "rationalist" model. The medium is the message.[472] What is said carries far less message than the language in which it is said. Why is Twining's model broken down into 23 numbered pieces? Why didn't Twining write the model down the usual way?

[471] See Introduction.

[472] M. McLuhan, **The Gutenberg** Galaxy (U. of Toronto, 1965) **The Medium is the Message** (Bantam, 1967) passim.

Either law is not rational or being rational is not what we think it is.

> The direct end of adjective law is rectitude of decision through correct application of valid substantive laws deemed to be consistent with utility (or otherwise good), and through accurate determination of the true past facts material to precisely specified allegations expressed in categories defined in advance by law, i.e. facts in issue, proved to specified standards of probability or likelihood on the basis of the careful and rational weighing of evidence which is both relevant and reliable presented (in a form designed to bring out truth and discover untruth) to a supposedly competent and impartial decision-maker with adequate safeguards against corruption and mistake and adequate provision for review and appeal.

It's not the same thing, is it? What does the form add? What does it subtract?

The 23 numbered points give us a picture of law as a totally rational, totally conscious activity. When the idea of law is broken down into 23 numbered points, you *think* you understand it. When you read it in a lump, you *know* you do not understand it. You get a source of sense what it means, but that's all. Breaking the model down into 23 numbered points makes it seem almost scientific: it is dissection, the microscope, isolation of variable. If we confine ourselves to inspecting tiny bits, we can see things. If we look at something big, we cannot see anything.

The 23 short numbered clauses call to mind the carefully defined terms in a mathematical equation. It's a shame Twining could not express the 23 points in symbols. Think how rational and consciously controllable law would be if the idea of it could be embodied in a formula.[473]

Law is not what Twining's model suggests. Law is a constantly varying mixture of the rational and the emotional, the conscious, the subconscious and the unconscious. Legal proof is an aspect of law. We are not totally aware of everything we think about legal proof, let alone in control of our ideas. Legal theory implicitly denies this reality, primarily, I think, because to admit it seems to make law and legal proof irrational. I choose not to define "rationality" as requiring 100% consciousness. I do not know exactly how to define "rationality" but the rationality of people and "thinking" machines is different.

To understand how they are different, reflect back on your reading of Twining's very deliberately numbered list. Somewhere along the line, you stopped reading the numbers. You continued reading the nominative phrases with predicative clauses as if they were a list of things … real things, presumably, since we are doing legal theory, which is not a fantasy. Twining deliberately put the numbers in and you took them out subconsciously as you embraced their message internally. Machines do not do that.

[473] The "assumptions" that get Twining to his model are explained in **Appendix 12.**

In **The Structure of Scientific Revolutions**,[474] Thomas Kuhn made it clear that even scientists do not have total conscious control of their thoughts. When scientists make a radical change in scientific theory, they do not make a conscious decision that new evidence has proven and old paradigm wrong and a new one right. Scientists change their thinking because, for reasons of which they are not aware, what counted as evidence for the old paradigm has ceased to be convincing. "The act of judgment that leads scientists to reject a previously accepted theory is always based upon more than a comparison of that theory with the world."[475] One major scientific revolution occurred when scientists went from thinking heavenly bodies revolved around the earth to thinking they revolved around the sun. When scientists became convinced of the new paradigm it was not because the evidence for it was overwhelming on a conscious level. Indeed, for a long time after the change occurred, there was *less* evidence for the sun-centered view than the earth-centered view. The new "evidence" was not stronger on a conscious, rational level. It was just more convincing to scientists.

> Like the choice between competing political institutions, that between competing [scientific] paradigms proves to be a choice between incompatible modes of community life.[476]

We don't know how or why we make choices between "incompatible modes of community life". We don't know how or why we "convinced of things". We don't know exactly how something is "proven", legally or otherwise.

Basic Changes in Law

Our vaunted *emotional detachment*, our ability to be scientific and objective, is the core of modern mythology. It is what is unsettling about the 23 point rationalist model of adjudication. If one is not emotionally detached, the list makes no sense and it only makes sense to the extent one can be emotionally detached. The myth of emotional detachment is fostered by law's casual assumption that it is possible to distinguish between the "objective" and the "subjective".[477] As I pointed out in Lecture IV, the subjective view is what a person him or herself would have believed, foreseen, thought, understood in the circumstances, or given consent to. The objective view is what a "reasonable person" would or should have believed, foreseen, thought, understood in the circumstances, or given consent to.[478]

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[474] 2nd ed. (University of Chicago, 1970).

[475] Id. at p. 77.

[476] Id. at p. 94.

[477] See p. 74.

[478] The Supreme Court of Canada has even identified a third level, the "modified objective" view. I comment on this in S. Wexler, *Liabiality for Medical Products, A Comment on ter Neuzen v. Korn and Dow v. Hollis*, (1996) 30 UBC L.R. 319, 325, n. 14.

Both of these are what the *jury* believes and the myth is that a jury can believe what a reasonable jury would or should believe. A jury can be objective and at the beginning of my life, it was a given that a jury was supposed to be *im*partial. This is no longer true. Acceptance of the fact that law has and does discriminate against various groups of people has made a jury suspect if it does not include members of groups that have been discriminated against. Now, at least in some cases, a jury is supposed to express the value of *balanced partiality*, not impartiality.

This huge change in theory is not limited to juries. Recently, a Canadian judge said that in deciding a case she had relied on the experience and values that being a Black woman had given her.[479] This created a storm of controversy. Modern fashion dictates that judicial robes may only be worn with an objective hat. When a Black woman becomes a judge, she must not allow her personal experiences and values to influence her decisions.

Until quite recently, however, judges and juries were *exclusively white and male*. That the experience and values of being white and male influenced the law is more than just obvious, it is a scandal. It is the skeleton in law's closet. Property is a central feature of law. Married women could not own it, Black slaves could be it and since first-Native North Americans did not have a concept of it, their homes could be taken from them willy-nilly.[480]

That women were a "weaker vessel"[481] was a *presumed*, not a *proven* fact. All through its long history, law could have presumed *either* that as regards their internal mental states, their feelings, intuitions, character, sense of responsibility and such, women were like men or unlike them. It is no accident that, in the hands of men, law has until quite recently presumed women were *unlike* men. Twenty-five hundred years ago, in ancient Greece, a woman could be a conduit through which property passed to her male heirs, but she could not own property herself. If she had no brothers, she might inherit from her father, but the property of an heiress was managed by her husband for the benefit of her sons.[482] Queen Elizabeth I had to resist marriage all her life, precisely

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[479] *R.* v. *R..D.S.* [1997] 3 S.C.R. 484.

[480] A few years ago, a graduate student who did not have English as his first language used the term "first-Native" in my Jurisdpridence class, combining First Nation and Native. I thought his "mistake" was lovely then and have followed it here.

[481] A. Fraser, **The Weaker Vessel: Women's Lot in Seventeenth Century England** (Weidenfeld & Nicholson, London, 1984).

[482] A wife might also have brought a dowry with her. This too was managed by her husband, and became the property of her sons at his death. If he ended the marriage without any fault on her part, in other words, if he sent her back to her father, he was obliged to return the dowry. People say the trust was invented by English lawyers and did not exist in Roman Law. It certainly existed in Greek Law.

Juries were once supposed to be impartial; now they are supposed to have balanced partiality.

because she did not want the management of her kingdom to fall into the hands of her husband. It was only in 1870, during Queen Victoria's reign, that the *Married Women's Property Act* ended the irrebuttable presumption of law that women were too "weak" to own property.[483]

Blacks and first-Natives were also "weaker" vessels as far as the law was concerned. I will not rehearse that history because it is so well-known, but I would point out that *Delgamuukw* v. *British Columbia*,[484] the case in which the Supreme Court of Canada recognized "aboriginal title" as existing alongside "legal title", implicitly repeats the presumption that first-Natives are different from whites internally, as regards their emotional relationship to property. The Supreme Court says this expressly, when it describes aboriginal title as "*sui generis*".[485]

One can see the slant of the presumption involved in Native title best, by asking whether one would prefer to be "indefeasibly entitled to an estate in fee simple to the land" or to have aboriginal title. Aboriginal title means the land can only be used in accordance with the spirit of aboriginal ownership, that is, for the improvement of the people and the land taken together. Fee simple absolute is no longer absolute, but it has no such restriction. One of the elements of property is the right to destroy it.[486] The Supreme Court has taken a first-Native concept, the unity of people and the land they live on, and placed it in a legal system that has a completely different slant.[487] Recognizing the difference between whites and first-Natives once again turns out to be disadvantageous to First-Natives, this time in the hands of a well-intentioned court.

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[483] M.L. Shanley, **Feminism, Marriage and the Law in Victorian England, 1850-1895** (Princeton, 1989) Ch. 2.

[484] [1997] 3 S.C.R. 1010, 153 D.L.R. (4th) 193.

[485] Id. at 1066.

[486] "The law makes a general assumption – which, as regards land, has now worn rather thin – that a person may use a thing belonging to him in any way he likes." F.H. Lawson and B. Rudden, **The Law of Property** (Clarendon, 1982) p. 9.

[487] James Hickling, a recent graduate of the UBC Faculty of Law and clerk at the Supreme Court of Canada, makes the insightful suggestion that in jurisprudential terms, the difference is between a natural law view of property and a positivist conception. In positivist terms, First Natives had been partners with their land, not owners of it.

Our ideas about legal proof are changing in big ways.

The law is *trying* to change.[488] This sometimes requires changes in our presumptions and changes in the definition of the facts that must be proven. It sometimes requires even more. In Lecture IV I talked about plaintiff-friendliness in connection with tort, but we can think about the ease or difficulty of proving facts everywhere in law. This depends to a large extent on the presumptions that apply and the way causes of action are defined. But it depends on other things as well: for instance, the admissibility of evidence. If you cannot introduce certain evidence, it is harder to prove certain facts.

In *Khan* v. *The Queen*,[489] a doctor was accused of molesting a three-year-old child during an office visit. The child, who was alone with the doctor when the alleged offence occurred, told her mother what had happened after they left the doctor's office. The mother then noticed a wet spot on the child's sleeve. She went to the police, where analysis showed the spot to be sperm.

Because the trial judge was unsure the child knew the difference between telling the truth and lying, he would not allow the child to testify against the doctor. He also would not allow the mother to testify about what the child had told her. The mother's evidence would have been hearsay. The only evidence against the doctor, therefore, was the fact that, after the child had been alone with the doctor, traces of sperm were found on the child's sleeve. On this evidence, the doctor was acquitted. The trial judge said, "In all the circumstances, and however suspicious I remain at this moment, the Crown has fallen just short of proof of the accused's guilt beyond a reasonable doubt."

The Supreme Court of Canada sustained the Ontario Court of Appeal in reversing the trial judgment and ordering a new trial. The Supreme Court said the judge should probably have allowed the child to testify, and held that the mother's testimony was admissible, even though it was hearsay. The legal basis for the Court's ruling is unclear. In essence, the Court seems to be saying that in cases of this sort, hearsay may be admitted because otherwise it would be too hard for the Crown to meet the burden of proof.

For obvious reasons, courts are reluctant to say this directly. In criminal cases, the rules of evidence are, if anything, supposed to favour the defendant. Courts are not supposed to change the rules of evidence so as to make it *easier* to convict, but in *State* v. *Lounsbery*,[490] the Supreme Court of Washington came close to admitting that the rules of evidence had been changed for precisely this purpose. The accused, who was charged with molesting his wife's child, objected to the admission of the wife's testimony on the

[488] When you think about it, this is remarkable because law is essentially conservative. Most of our society wants to change the bad attitudes it has had about women, Blacks and first-Natives. Much of our society is coming to feel that way about gays and lesbians. It is hard to believe this, but someday, those with money and power may someday come to see that those without money and power think and feel the same way they do.

[489] [1990] 2 S.C.R. 531, 79 C.R. (3d) 1, 59 C.C.C. (3d) 92, 113 N.R. 53.

[490] 445 P.2d 1017 (1968).

grounds that, by statute, the testimony of a husband or wife could not be used against their spouse, except in "a criminal action or proceeding for a crime committed by said husband or wife against any child of whom said husband or wife is the parent or guardian".[491] The accused was not the parent or guardian of the child, but the court said the exception covered the testimony of the wife because the purpose of the exception in the statute was "so that offenders might be punished".[492]

There have been *tremendous* changes in the law recently. One of the most tremendous, as far as the theory of legal proof goes, has been generated by the words "demonstrably justifiable" in the Canadian *Charter of Rights and Freedoms*.[493] Section 1 of the *Charter* "guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

Whether a statute is constitutional or not is a question of law. This question *never* goes to a jury and is *always* appeallable. The word "justified", therefore, means a question of law. But the word "demonstrably" means a question of fact. To speak of something being "demonstrably justifiable" erases the distinction between law and fact. The Supreme Court of Canada regularly talks about the "burden of proof" on questions of constitutionality. Other courts over the years have inched up to this line, but have always been reluctant to cross it. In *Lochner* v. *New York*, for instance, Mr. Justice Harlan said, "when the validity of a statute is questioned, the burden of proof, so to speak, is upon those who assert it to be unconstitutional".[494] Mr. Justice Harlan felt compelled to say "the burden of proof, *so to speak*" because he knew that technically, the phrase burden of "proof" could not be applied to a question of law. Burden of "proof" only applies to questions of fact.

This same reluctance can be seen in *Edwards* v. *Canada*, a case in which the Privy council had to interpret the meaning of the word "person" in the statute that governed appointment to the Canadian Senate: "The word 'person' ... may include members of both sexes, and to those who ask why the word should include females the obvious answer is why should it not? ... [T]he burden is upon those who deny that the word includes women to make out their case".[495] Like constitutionality, the meaning of the words in a statute is a question of law, not fact. The "burden" in *Edwards* could not, therefore, have been a "burden *of proof*".

The Supreme Court of Canada has now crossed this line. In *R.* v. *Swain*, Lamer C.J.C. said, "Societal interests are to be dealt with under s.1 of the *Charter*, where the

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[491] Id. at 1020.

[492] Ibid.

[493] Whether Pierre Trudeau knew he would unfold law with those words is not clear, but unfold it he has.

[494] 198 U.S. 45, 68 (1905).

[495] [1930] A.C. 124, 138.

Crown has the burden of proving that the impugned law is demonstrably justifiable in a free and democratic society."[496] The Court has even gone so far as to spell out the *standard* of proof on questions of constitutionality, "The standard of proof ... is the civil standard, namely proof by a preponderance of probability. The alternative criminal standard, proof beyond a reasonable doubt, would, in my view, be unduly onerous.…"[497]

It is going very far to say the Supreme Court of Canada is converting constitutional law into tort law, but the court has said, "the onus [is] on the State to demonstrate the superiority of its interests to that of the individual".[498] This sounds like nuisance and the following assessment sounds very much like one a jury might be asked to make in a negligence action: "[A]n assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy to advance its goals, notably those of law enforcement."[499]

This change is as revolutionary for legal theory as the change in the status of women, Blacks and first-Natives is for law in general. But of course, the changes have not come only at this macro-level. There have been little changes that are equally astonishing. For instance the Supreme Court of Canada has recently said, "The law would be better served if the maxim [*res ipsa loquitur*] was treated as expired and no longer used as a separate component in negligence actions."[500]

Ever since I first learned about *res ipsa loquitur*, I have been told the Latin phrase expressed a presumption that a human mind would *inevitably* make. In case after case, I have read that *res ipsa loquitur* was not something the law had made up. It was something that was natural in peoples' minds. Legally, an accident can only happen in two ways: with or without negligence by the defendant. The party who says there was negligence has the burden of proving it, but barrels of flour do not normally just "fall" out of warehouses. Ordinarily, if a barrel of flour falls out of a warehouse, it is because someone was careless and thus, if it is proven that the defendant was in control of the warehouse, any sane person would be virtually *obliged* to presume that the defendant had been negligent. We would not make this presumption irrebuttable, but it is where we would start.

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[496] (1991), 5 C.R. (4th) 253, 285, 63 C.C.C. (3d) 481, [1991] 1 S.C.R. 933.

[497] *R.* v. *Oakes* [1986] 1 S.C.R. 103, 137, (1986) 24 C.C.C. (3d) 321, 26 D.L.R. (4th) 200, 50 C.R. (3d) 1.

[498] *Hunter* v. *Southam* [1984] 2 S.C.R. 145, 14 C.C.C. (3d) 97, 11 D.L.R. (4th) 641, 653.

[499] Id. at 652-3. One small, ironic, impact of the change is that decisions on constitutional questions may no longer be binding. Since constitutional decisions are now the product of social science evidence, new evidence can lead a court to a new decision. *Pacific Press* v. *B.C.* [2000] BCJ No. 308, para. 101 (B.C.S.C., per Brenner, C.J.).

[500] *Fontaine* v. *British Columbia* [1998] 1 S.C.R. 424, 435, 156 D.L.R. (4th) 577.

What is the Supreme Court telling us? It cannot be saying people will no longer be allowed to *think* in a way that is natural and inevitable. If the Court meant that, it would be saying something like, "People would be better served if hunger and thirst were treated as expired and no longer used as a separate component in deciding whether to eat or drink." The minimum procedural effect of *res ipsa loquitur* is to get a case to the jury. The Court cannot mean judges should now dismiss actions in which the plaintiff cannot explain how an accident happened because it expressly says, juries are still allowed to infer negligence. We are just not supposed to call this inference "*res ipsa loquitur*".

The High Court of Australia spoke in the same vein when it declared that *Rylands* v. *Fletcher* was no longer a cause of action in that country. The High Court said the change it was making in the law would create no change in legal results. Every case that would have succeeded under *Rylands* v. *Fletcher* would succeed under negligence or nuisance (or perhaps trespass).[501] *Rylands* v. *Fletcher* was just extra baggage.

Neither court gives any positive reason for the change it makes.[502] Neither says injustice is occurring. Neither says defendants are being found liable when they should not be. On the face of it, both changes are expressly *cosmetic*, but I am suspicious of cosmetic changes in law. Both changes do make the law *theoretically* less plaintiff-friendly, and it seems to me at least *possible* that the judges have not thought of *every* situation that will arise. In the future, there may be a plaintiff who will lose a case that he or she would have won if there were still *res ipsa loquitur* or *Rylands* v. *Fletcher*. The great lesson of Common Law is that no one knows what future cases will reveal.[503]

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[501] *Burnie Port Authority* v. *General Jones Pty Ltd.* (1994) 68 A.L.J.R. 331, 348.

> Once it is appreciated that the special relationship of proximity which exists in circumstances which would attract the rule in *Rylands* v. *Fletcher* gives rise to a non-delegable duty of care and that the dangerousness of the substance or activity involved in such circumstances will heighten the degree of care which is reasonable, it becomes apparent subject to one qualification, that the stage has been reached where it is highly unlikely that liability will not exist under the principles of ordinary negligence in any case where liability would exist under *Rylands* v. *Fletcher*. … The qualification mentioned in the preceding paragraph is that there may remain cases in which it is preferable to see a defendant's liability in a *Rylands* v. *Fletcher* situation as lying in nuisance (or even trespass) and not in negligence.

[502] Both courts do say they are eliminating confusion. Thus, the Supreme Court of Canada said,

> Whatever value *res ipsa loquitur* may have once provided is gone. Various attempts to apply the so-called doctrine have been more confusing than helpful.
>
> *Fontaine* v. *British Columbia* [1998] 1 S.C.R. 424, 435, 156 D.L.R. (4th) 577.

And the High Court of Australia said,

> [J]udicial alterations and qualifications of Blackburn J's statement of the "true rule" have introduced and exacerbated uncertainties about its content and applications.
>
> *Burnie Port Authority* v. *General Jones Pty Ltd.* (1994) 68 A.L.J.R. 331, 338.

Getting rid of confusion is, of course, to the good, but it is hardly a reason for changing the law. Heaven knows, law has never been afraid of a little confusion.

[503] In any case, I know there are changes going on that make the law *more* plaintiff-friendly. The change in the U.S. on products liability is one, as is the change in Common Law generally on breach of fiduciary duty.

What Future Cases Will Reveal

To my amazement, I think the theory of proof may be changing so much that we make a mistake when we speak of "future cases" revealing anything. To do so presumes there will be litigation *forever*. The big new thing in law is alternative dispute resolution (ADR).[504] If we ask what alternative dispute resolution is alternative to, the answer is cases, trials, adversarial justice, in other words, proof and law. I will discuss the change from law to ADR in terms of a distinction Aristotle drew at the very beginning of his handbook on legal argument, the **Rhetoric**. The distinction is between two forms of argument: rhetoric and dialectic. Examining law and ADR in terms of the distinction between rhetoric and dialectic also allows me to say something about the distinction between questions of fact and questions of law.

According to Aristotle, dialectical arguments employ syllogisms. The classic example of a syllogism is, all men are mortal, Socrates is a man, Socrates is mortal. There is a major premise, a minor premise and a conclusion that necessarily flows from the premises. If the premises are correct, the conclusion *must be* true.

Dialectical argument yields knowledge. Rhetorical argument, on the other hand, leads to opinions. It employs what Aristotle calls "enthymemes", which he says are a "sort of syllogism".[505] An enthymeme has a major premise and a minor premise and leads to a conclusion, but the conclusion cannot be said to be "true", only probable.[506]

An "enthymeme" is a rule of thumb, a generality, a presumption. Barrels of flour do not normally fall on people unless someone was careless, a barrel of flour fell on someone, someone was careless. As a rule of thumb or presumption this makes good sense but it does not work at a *logical* level, the way a syllogism does. It works at a *psychological* level or on a *statistical* plane. With syllogisms, we "prove" things; with enthymemes, Aristotle says, we "seem" to prove them. In other words, we infer them.

The distinction between rhetoric and dialectic parallels the distinction between questions of fact and questions of law. A decision on a question of law is treated as a

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[504] There has, of course, been alternative dispute resolution for a long time. The change I am talking about is a change in the legal culture. ADR is now explicitly recognized and discussed. Before, it existed but was not discussed.

[505] (I, i, 11).

[506] It is interesting that there is no English word for "enthymeme". "Syllogism", though not common, is an English word. "Enthymeme" is not.

Alternative dispute resolution is an alternative to law as law is an alternative to war.

matter of knowledge, whereas a decision on a question of fact is treated as a matter of opinion. The distinction between fact and law is used in three ways in law. It marks off those questions that must be decided by a jury (when there is one) from those that must be decided by a judge. It also marks off those decisions of a trial court that may be appealed to a higher court and those decisions of an administrative body that may be reviewed by the courts from those that may not be. The reason decisions on questions of law can be appealed and reviewed is that a judge or an administrator can make a *mistake* about the law or be *wrong* about it. There can be *errors* of law and these should be corrected.

Decisions on questions of fact cannot be appealed or reviewed because facts are not a matter of knowledge or truth. They are a matter of probability and opinion. People can legitimately disagree about questions of fact. A jury or an administrator cannot be "wrong" or "mistaken" in its conclusion about a question of fact. The way to see this distinction most clearly is to notice that if a decision on a question of fact is so egregiously out of line as to be *totally* unreasonable, it *becomes* an error of law, which can be corrected on appeal or review.

The trouble with using the distinction between dialectic and rhetoric as the distinction between law and fact is that there is a formal difference between dialectic and rhetoric that is not matched by the difference between law and fact. Aristotle says, dialectic is used in an argument between two people who have *the same goal*, namely, to reach the truth. A good example might be two doctors who disagreed about the best treatment for a patient. They would argue until they came to some agreement.[507]

In a dialectical argument *each person tries to convince the other*. In a rhetorical argument *two people both try to convince a third party who has the power to decide between them*. These are totally different forms. Arguments on questions of law and arguments on questions of fact are *both* rhetorical. Both are between parties with *opposite goals* and both are made to third parties with the power to decide. The plaintiff wants to persuade the judge on the law and the jury on the facts, and so does the defendant. Each wants his or her argument to prevail and neither has any commitment to the truth. All argument in court, whether on the facts or the law, is rhetorical in the sense that it is *necessarily* tendentious. A lawyer presents both the facts and the law from one point of view only, that of his or her client. A lawyer is formally incapable of being persuaded by the opposing lawyer's arguments on either the facts or the law.

An argument about a question of law *could* be dialectic, but only if it were *academic*. If two law professors disagreed about what the law was, they might argue dialectically. Each would put the best case he or she could and the other would try to

[507] The agreement might not be "true" knowledge because the premises might be wrong, but in theory, the dialectical method can yield true knowledge: right and wrong answers. If a third doctor came along and said the conclusion was in error, the dialectic would resume. Dialectic can be never-ending. Rhetoric cannot. My friend and former student, Jim Aldridge, says this is what characterizes all legal argument: a decision must be made.

refute it. Ultimately, one might be persuaded that the other's view was correct, or perhaps they would come to some sort of synthesis, in which they realized that both views were correct. Or perhaps they would go on disagreeing forever. That is not the way courts work. We treat decisions on the law as if they were the products of dialectic and decisions on the facts as they were the products of rhetoric, but legal trials are not academic. They are highly practical and must come to a conclusion.

Persuading a jury about the facts and persuading a judge about the law are the same process. One is technical and one is not, but *neither* is dialectical. ADR is dialectical, at least theoretically. In ADR, it is the disputants themselves to whom things must be "proven"; indeed, it is a bit coarse even to speak of "proof" in connection with ADR. Since there is no decision by a third party, proof is not at issue. ADR is not about proof. It is about finding a solution the parties can live with. When the parties discover what they can live with, they have found the only truth that counts for them, the one that resolves their dispute.

There is one more thing I want to say about ADR. I feel a bit diffident about saying it because it has to do with women, and men have said so much that was wrong and hurtful about women, particularly in law. But here goes: I think the move from rhetoric to dialectic is a move in a feminine direction. *All* women are not more disposed than *all* men to look for a solution everyone can live with, and *all* men are not more disposed than *all* women to fight it out and have one guy win. But it seems to me, and to Carol Gilligan,[508] that there is a difference between men and women on this score.

The difference is not just between men and women. First-Natives use a tribal circle rather than a court and are concerned to reach a truth all parties will acknowledge, rather than one that can be "proven". It is hard to say where the descendants of the slaves would come down on the question of dialectic and rhetoric, but in Africa, I understand that, even today, there are tribal courts that consist of the whole community and seek a dialectical resolution of disputes. A colleague and friend of mine, who was with the Peace Corps in Tanzania in the late 60s, tells me that one of the subtle pressures that led people to accept the settlements worked out in the tribal courts was that if they didn't, they would have to go to the formal courts, which applied a mixture of English common law and Indian codified law. The Native attitude toward these courts is very instructive. My friend says that during the time he was in Tanzania, a case being argued before the High Court was interrupted when one of the judges thought he recognized the dispute as one upon which the court had already made a ruling. Asked to explain why the case was before the court again, the plaintiff said the judge was right. The dispute had been in the High Court once before and the court had decided in his favour. He had then gone back to his tribe and told them "wise people in Dar-Es-Salaam say I am right". The tribe, however, refused to follow the court's decision, so he had returned.

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[508] As part of the academic dialectic, I cite C. Gilligan, **In A Different Voice** (Harvard, 1982). I do not believe I am saying anything different from what she says, but I am a man and experience teaches me that, where women are concerned, men, including myself, have not always been scrupulously trustworthy.

Enforceability is the big problem with ADR. I have already quoted Maitland's observation that "in the competition of courts, therefore, the king's court has a marked advantage; to say nothing of its power to enforce its judgments it has, for those who can purchase or otherwise obtain such a favour, a comparatively rational process".[509] In the competition between ADR and law, ADR may have a more rational process, but law has the power to enforce its judgments. If the parties cannot agree to agree, they cannot use ADR and if they do use ADR and one of them later refuses to do what they agreed to do, the other has no choice but to go to law to have the agreement enforced. In saying I see enforcement as necessary, I am saying I prefer power constrained by reason to reason on its own. In saying this, I sound like such an old white man.

Is legal proof a by-gone game for old white men?

[509] Maitland, p. 18.

Closing Words

This book is not and is not meant to be a complete treatment of legal proof. There could not be such a thing. Legal proof is too big and too diverse to be treated completely. Every book about law is a book about legal proof. I treat what I think is most important about legal proof and use examples from areas of law I know. If there is one unified idea behind this book, it is that legal proof is not a matter of ideas; it is a matter of feelings. However much time has been spent thinking about legal proof, as much or more has been spent dreaming about it.

The elaborately elaborated theory of legal proof is constantly on the edge of breaking down into incoherent chaos. It is a Humpty-Dumpty, an imposition on reality, constantly on the verge of toppling. If it fell, it would crack like an egg. All the king's horses and all the king's men could not put it together again. As humans we would be compelled to try, but mercifully, we do not face this obligation because law is reality not theory. Things are actually proven legally. Because of this, real things happen to real people in the real world. Law and legal proof are saved from being *merely* ideas by what the Greeks called *praxis*.

Law and its requirement of proof slows us down and makes us conservative. The actual *praxis* of law provides enough stability to keep legal theory and the theory of legal proof from crashing. We have made a leap of faith and continue to make it. I used to think I was a sceptic till I read **Ignorance: the case for scepticism**[510], on the first page of which the following assertion appears: "no one knows anything about anything." In the days when I thought I was a sceptic, I played with that idea, but when I saw it actually written down in a book, I realized that I do not believe it. We know plenty of things and plenty of things can be legally proven … for all *practical* purposes.

We have the feeling that things are legally proven. That is enough. This book is about that feeling.

[510] P.K. Unger (Clarendon Press, 1975)

Appendices

Lecture II: Appendix 1:
The Standard of "Proof" on a Question of Law

There are fewer and fewer juries all the time,[511] but the procedure of Common Law is based on the model of a jury trial.[512] In a jury trial the parties present evidence, a judge instructs the jury on the law, and then the jury decides the facts.[513] When it comes to deciding the facts, the judge tells the jury which party has the burden of proof and what standard that party must meet to satisfy the burden. For ordinary legal proof, the party with the burden must convince the jury on a balance or preponderance of the probabilities; for proof of guilt, the party with the burden of proof must convince the jury either beyond a reasonable doubt or by clear and convincing evidence. If there is no jury, the judge decides the questions of fact and reminds him or herself which party bears the burden and how convinced he or she must be to find that a burden has been met.

When there is a question of law to be decided, it is decided by a judge, whether or not there is a jury. We do not talk about convincing a judge on a question of law in the same terms as we talk about convincing a jury on a question of fact. We do not use the word "proof" about questions of law, and rarely speak of there being a "burden" on the law.[514] But there are standards that apply to questions of law, standards for how convinced a judge must be. These standards can be *lower* than the ordinary standard of proof or *higher* than either of the standards used in proof of guilt.

On a question of law, the standard is usually *less* than a balance of the probabilities. For example, pending the trial on a permanent injunction, an interim injunction may be granted if the party seeking the permanent injunction can prove

a) that if an interim injunction is not granted, it will suffer irreparable harm
b) that the harm it will suffer cannot be compensated by damages, and
c) that it has a *prima facie* case for the permanent injunction, a case which is likely to be successful.[515]

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[511] For some speculation on this, see Lecture VI, passim.

[512] Trial by Jury might also take capital letters, see above n. 39.

[513] There is a bit more to trials than this: for instance, pleadings and motions. I discuss these in Lecture II, p. 29 ff.

[514] See, Wexler, *Burden of Proof, Writ Large*, 33 U.B.C. Law Rev. 75, 86-7 (1999), and Lecture VI, p. 144-5.

[515] *Glace Bay General Hospital* v. *Canadian Brotherhood of Railway Transport and General Workers' Union* (1979) 37 N.S.R. (2d) 79, 8367 A.P.R. 79 (S.C.)

The first questions are questions of fact and the standard of proof on them is proof on a balance of the probabilities. Whether there is a *prima facie* case is a question of law and the standard of a *prima facie* case is clearly something less than a balance of the probabilities.

Another standard that is less than a balance of the probabilities is used when a plaintiff seeks an order in British Columbia allowing service of process outside the province in a civil action. The court may grant such an order "if the plaintiff makes out a good arguable case that an order for service ex juris should be granted".[516]

A third example of a standard that is less than a balance of the probabilities arises under the *Bankruptcy Act*.[517] In order to have a receiver appointed, an applicant must show that there is a necessity to protect the estate and that there is a "strong prima facie case" of bankruptcy.[518]

It is also possible to identify a standard that is higher than the criminal standard. For instance, in *A.G. Canada* v. *Inuit Taparisat of Canada*, Estey, J. said a case should only be dismissed or stricken on the pleadings "where the court is satisfied that 'the case is beyond doubt.'"[519] This is clearly higher than the criminal standard, which is proof beyond a reasonable doubt. Here, it is required that there be no doubt.[520]

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[516] *Davidson* v. *The Anchorage Inc.* (1980) 23 B.C.L.R. 352, 356 (S.C.).

[517] R.S.C. 1985, c. B-3.

[518] *Re Imperial Broadloom Co.* (1978) 22 O.R. 129, 135, 92 D.L.R. (3d) 390 (S.C. Bkcy.).

[519] [1980] 2 S.C.R. 735, 740.

[520] For more on the standard of proof on questions of law, see Lecture VI, p. 144-5.

Lecture II: Appendix 2
The Blue Bus Problem

Some scholars say the standard of proof on a balance or preponderance of the probabilities involves an external standard. It is not enough, they say, that the plaintiff's case be more convincing than the defendant's case: the plaintiff must prove its allegations of fact are "probably" true.[521] This has led to the blue bus problem.

> While driving late at night on a dark, two-lane road, a person confronts an oncoming bus speeding down the center line of the road in the opposite direction. In the glare of the headlights, the person sees that the vehicle is a bus, but he cannot otherwise identify it. He swerves to avoid a collision and his car hits a tree. The bus speeds past without stopping. The injured person later sues the Blue Bus Company. He proves, in addition to the facts stated above, that the Blue Bus Company owns and operates 80% of the buses that run on the road where the accident occurred.[522]

Some scholars think the plaintiff would lose this hypothetical case even though the plaintiff's allegation is "probably" true. For Charles Nesson and others, this is not enough:

> Although the defendant probably caused the plaintiff's injury, the fact finder cannot reach a conclusion that the public will accept as a statement about what happened.… [T]he factfinder cannot, and the public knows it cannot, make anything other than a bet on the evidence.[523]

That the plaintiff's allegation is probably true in the blue bus problem is not enough for Laurence Tribe either. He raises his concerns in terms of the "ritual" of a trial and says,

> Methods of proof that impose moral blame or authorize official sanctions on the basis of evidence that fails to penetrate or convince the untutored contemporary intuition threaten to make the legal system seem even more alien and inhuman than it already does to distressingly many.[524]

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[521] For instance, J.P. McBaine, *Burden of Proof: Degrees of Belief*, 32 Cal. L.R. 242 (1944).

[522] I have taken this statement of the problem from Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 Harv. L.R. 1357, 1378 (1985). The problem is discussed in many articles and books. I have not been able to identify the first statement of it as a hypothetical.

[523] Ibid.

[524] *Trial By Mathematics: Precision and Ritual in the Legal Process*, 84 Harv. L.R. 1329, 1375-6 (1971).

Tribe notes that his point "applies with greatest force in the criminal context," but says, "it also has some significance in much ordinary civil litigation".[525] This is wrong. Neither Tribe's point nor Nesson's has *any* significance in "ordinary civil litigation".

The blue bus problem is based on *Smith v. Rapid Transit Inc*,[526] a case in which a verdict was directed for the defendant. On appeal, this was sustained because

> The ownership of the bus was a matter of conjecture. While the defendant had the sole franchise for operating a bus line on Main Street … this did not preclude private or chartered buses from using this street; the bus in question could very well have been one operated by someone other than the defendant.[527]

The reasoning is faulty. The court suggests that if the defendant's franchise had precluded other buses from using Main Street, the plaintiff might have had a case, but even if the defendant's franchise had precluded other buses from using Main Street, "the bus in question could very well have been one operated by someone other than the defendant." Buses sometimes go where they are not legally allowed to go.[528]

Smith was wrongly decided. The plaintiff should have been allowed to go to the jury. Whether the jury would have decided the plaintiff's case was better than the defendant's is not clear, but the jury should have been allowed to make that decision. This can be seen very clearly if one examines *Sargent* v. *Massachusetts Accident Co.*, a case quoted in *Smith* as saying,

> [A] proposition is proved by a preponderance of the evidence if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there.[529]

Sargent is a case about an accident policy to be paid if the insured suffered death by accidental injury. The insured was last seen in the wilderness going down the river, alone, in a kayak. A month later his paddle, and seven months after that, part of his kayak, were found in the river. The body was never located, so no one could tell how or why the insured had died. The insurance company refused to pay and the beneficiary sued. The burden in this contract action was on the beneficiary to prove that the insured had died from an accidental injury. After the beneficiary presented its evidence, the trial

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[525] Id. at 1376, n. 150.

[526] 317 Mass. 469, 58 N.E. 2d 754 (1945).

[527] Id. at p. 755.

[528] The bus might not even have been a bus. It "could well have been" a UFO operated by extra-terrestrials.

[529] 307 Mass. 246, 250, 29 N.E.2d 825, 827.

court granted the defendant's motion to dismiss the action. As a matter of law, the court decided the case should not even go to the jury because there was no evidence on which a jury could find that the insured had died from an accident.

The comment that a fact could only be found on a preponderance of the evidence if there was an "actual belief in its truth" sounds like it comes from this decision. It does not. It comes from the opinion of the appellate court, which *reversed* the trial decision.

> Upon the evidence, in the opinion of a majority of the court, a jury could find, not merely that there was a greater chance that the insured met his death by accident falling within the policy than that he met a different fate, but that death by accident within the policy was in fact indicated by a preponderance of the evidence.[530]

As *Sargent* makes clear, *the blue bus problem is not relevant to ordinary legal proof*. Where guilt is not an issue, where the only question is compensation, the law places the burden of proof upon the plaintiff. If the jury cannot say the plaintiff's case is stronger than the defendant's, the defendant wins, but if the jury can say the plaintiff's case is stronger than the defendant's, the plaintiff does and should win. It is an added plus if a jury applying the balance of the probabilities standard has an actual belief in the truth of the facts it finds, but this is not required.[531]

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[530] Ibid.

[531] The blue bus problem is relevant *to proof of guilt* and is apposite in discussions of cases like *People* v. *Collins* 68 Cal. 2d 319, 438 P.2d 33, 66 Cal. Rptr. 497 (1968), where probablistic evidence was introduced in a *criminal* trial.

But then, probablistic evidence is *regularly* introduced to prove guilt. Fingerprint and DNA evidence are only probablisitic. I have discussed the blue bus problem to show that statistically "probable truth" is not part of ordinary legal proof, but I apologize for using this problem at all. The blue bus problem is "post-modern" in the worst sense. It teaches us *nothing* about law. If we took it seriously, it would make us think law was stupid. We know DNA evidence and fingerprint evidence are only probablistic. How can we allow them to establish identity *beyond a reasonable doubt*? Is it because the percentages are higher?

That law is not fully consistent and totally complete has not been news since Gődel. All systems can be deconstructed. I find it unpleasant to be reminded of that fact, and apologize for reminding you of it.

Lecture II: Appendix 3
What is Quasi-Criminal?

That *Speas* and *Overman* v. *Loesser* are cases dealing with quasi-criminal elements is obvious, but the fact that a civil case is quasi-criminal is not always as obvious as it is in these two cases. Indeed, it can sometimes be quite difficult to see that a civil case is quasi-criminal. In the first edition of **Wigmore**, there are only two examples of cases in which the burden of proof split: *Menomenie River Sash and Door Co.* v. *R. Co.*[532] and *Carver* v. *Carver*.[533] The second edition contains these same two cases plus 7 more. Three of them – *Woodward* v. *Chicago Minneapolis and St. Paul Railway Co*,[534] *Olmstead* v. *Oregon S.L. Railway Co.*,[535] *Continental Insurance Co.* v. *Chicago & North Western Railway Co*.[536] – are cited in the footnote with *Menomenie*.[537] Another three – *Jordan* v. *Jordan*,[538] *Wylie* v. *Marinofsky*,[539] *and Ginn* v. *Dolan*[540] – are cited in the footnote with *Carver*.[541] One case – *Page* v. *Camp Mfg. Co.*[542] – is quoted extensively in the text of the second edition. Of these nine cases, only *Carver*, W*ylie* and *Ginn* are not quasi-criminal. These three cases belong in a special category I will discuss below. All the rest of the splitting-burden cases cited in the first two editions of **Wigmore** involve guilt.

In *Jordan* v. *Jordan*, the director of a company sought to recover from the receiver appointed when the company went bankrupt. The claim of the director was based on certain transactions between the director and the company. The court held that the director, as a fiduciary of the company, had the burden of proving that the transactions were perfectly fair, and having failed in this, he could not recover.

The majority decision does not involve any splitting of the burden of proof. Wigmore's citation is to the dissent (a fact Wigmore neglects to mention). The dissent

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[532] (1895) 91 Wis. 447, 65 N.W. 176, cited in Wigmore's 1st ed. at Vol. IV, sec. 2487, n. 8, p. 3529.

[533] (1884) 97 Ind. 497, cited in Wigmore's 1st ed. at Vol. IV, sec. 2489, n. 2, p. 3532.

[534] (1906) 145 Fed. 577 C.C.A.

[535] (1904) 27 Utah 515, 76 Pac. 557.

[536] (1906) 97 Minn. 467, 107 N.W. 548.

[537] Vol. V, sec. 2487, n. 8, p. 446.

[538] (1920) 94 Conn. 384, 109 Atl. 519.

[539] (1909) 201 Mass. 583, 88 N.E. 448.

[540] (1909) 81 Ohio 121, 90 N.E. 141.

[541] Vol. V, sec 2489, n. 2, p. 449.

[542] (1920) 180 N.C. 330, 104 S.E. 667.

refers to Thayer and says the burden of proof should split: the director should have the burden of offering evidence that in the transactions for which he seeks to recover, he dealt with the company at arm's length, as a stranger and that once the director meets this evidentiary burden of proof, the receiver should have the burden of proving that the debts were incurred by fraud. This is the ordinary rule when a receiver seeks not to pay a debt.

That the dissent sees the case as quasi-criminal is clear.

> If in fact a stranger had presented the claim, would it have been his duty, in addition to showing the facts on which he based his claim to go further and establish as part of his main case that he was not a fraud and a cheat? ... [W]hen Sisk established that he in fact dealt as a stranger, why is he not entitled to the presumption of honesty like any other stranger...?[543]

The majority in *Jordan* says that the presumption of innocence does not apply to a director in his dealing with the company: he must prove his dealings were honest. The dissent says the burden of proof splits. The director must offer evidence that he acted at arm's length, as a stranger in his transactions with the company, and then the burden is on the receiver to prove fraud or dishonesty.

The Railroad Fire Cases

Page v. *Camp*, *Menomenie* and the three cases cited with *Menomenie* are all railroad fire cases. At the time these cases were decided, they too were seen as quasi-criminal. From 1880 to 1930 there were hundreds of railroad fire cases in the United States. Most pitted farmers against railroads and all of them were based on statutes. In most states, the statutes provided that if the farmer could prove the fire was started by a cinder from a passing train, this was *prima facie* evidence that the railroad had been negligent.

> All railroad companies or corporations operating or running cars or steam engines over roads in this state shall be liable to any party aggrieved for all damages caused by fire being scattered or thrown from said cars or engines, without the owner or owners of the property so damaged being required to show defect in their engines or negligence on the part of their employees; but the fact of such fire being scattered or thrown shall be construed by all courts having the jurisdiction as prima facie evidence of such negligence or defect.[544]

The phrase "*prima facie* evidence of negligence" is equivalent to the phrases "*circumstantial* evidence of negligence", "evidence from which negligence may be *inferred*" and "evidence which raises a *presumption* of negligence". All four of these phrases mean the same thing, but it is never clear exactly what they mean. Presumptions

[543] (1920) 94 Conn. 384, 109 Atl. 519, 522.

[544] General Statutes of Minnesota, 1894 #2700.

can affect a wide variety of consequences[545] and the statute I have quoted could have been taken to mean three different things. At a minimum, it meant that a farmer who proved a fire had been started by a cinder from a railroad engine could not be non-suited for failing to provide evidence of negligence. In other words, evidence that a fire was started by a cinder from an engine was deemed to meet the farmer's evidentiary burden of proving that the railroad had been negligent.

But this was just the minimum. The statute could also have been taken to mean that once the farmer gave evidence that the fire was started by a spark from an engine, the burden of proving that the railroad had not been negligent shifted to the railroad. If the railroad did not convince the jury it had not been negligent, the farmer would win.

The third possible way to interpret these statutes was as splitting the burden of proof, rather than shifting it, and this is what was held in the cases Wigmore cited. Those cases said that once the farmer introduced evidence that the fire had been started by a cinder from a railroad engine, the railroad had the burden of offering evidence that it had not been negligent, but not the burden of convincing the jury. Thus, the railroad could offer evidence that the engine which emitted the cinder was in proper running order and had been equipped with a proper screen at the top of its smoke stack; the engine and the screen had been properly maintained; the cinders in the fire box had been raked back, out from under smokestack, so they would not be liable to go up in the draft; and the engine had not been driven too fast. (Fast driving tended to generate and throw off more cinders).

If the railroad failed to offer such evidence, or if it was decided that the evidence offered by the railroad was insufficient to meet the evidentiary burden of proof, the judge could direct a verdict for the farmer. But if the railroad met the burden of offering enough evidence so that a jury could find it had not been negligent, the persuasive burden of proving that the railroad had been negligent remained on the farmer. The farmer had to convince the jury on a balance of the probabilities that the railroad had been negligent.

Wigmore took these cases to indicate that it was normal for the burden of proof to split in ordinary civil cases, and he presented them in this way. It is not normal for the burden of proof to split in ordinary civil cases. The burden of proof split in the railroad fire cases because they were perceived as requiring proof of guilt. The civil action by the farmer was seen as a way to enforce a general duty the railroads owed to the public at large.

In New Jersey this was clear because the same act that made the railroads liable for fires also required the use of screens and other devices to prevent fires.[546] In other states the quasi-criminal nature of the action can be seen from the statutes, which did more than just make the starting of a fire *prima facie* evidence that the railroad had been

[545] On presumptions, see Lecture IV, p. 79-80, 88-95.

[546] *Wiley* v. *West Jersey Rwy Co.* 44 N.J. Law (15 Vroom) 247.

negligent. In some states railroads were made liable for *any* fires started by their engines, regardless of whether or not the railroad had been negligent.

> Each railroad corporation owning or operating a railroad in this state shall be responsible in damages to every person and corporation whose property may be injured or destroyed by fire communicated directly or indirectly by locomotive engines in use upon the railroad owned or operated by such railroad.[547]

This "strict liability" is analogous to the liability in *Rylands* v. *Fletcher*,[548] the English case holding that even without proof of negligence, a landowner was liable for any damage caused by the escape of a reservoir of water which he had collected on his land. Professor Simpson has shown that *Rylands* v. *Fletcher* was decided in a climate generated by two bursting dams that caused floods and killed large numbers of people, and the quasi-criminal feeling associated with these incidents is clear in the report of the coroner's jury inquiring into one of them.

> [T]he commissioners, in permitting the Bilberry Reservoir to remain for several years in a dangerous state and with full knowledge thereof, and not lowering the waste pit, have been guilty of willful and culpable negligence, and we regret that the reservoir being under the management of a corporation prevents us from bringing in a verdict of manslaughter....[549]

The American statutes putting "absolute liability" on railroads for fires caused by their engines were challenged by the railroads first, as an unconstitutional infringement of the contractual rights granted to them by state charters and second, as a taking of their property without due process of law. *Mathews* v. *St. Louis & S.F. Rwy Co.* upheld the Missouri absolute liability statute on the basis that it was a proper exercise of the state's "police power", necessary "to prevent destruction of property by fire".[550]

The court in *Mathews* said the statute making the railroad liable for starting fires was "identical" to one requiring railroads to fence their tracks and making railroads liable for cattle killed if they wandered onto unfenced tracks. The court asked whether the farmer was not

> as much entitled to protection from fire set out by engines as he is against the killing of his stock by engines.... Is it to be concluded that the

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[547] Missouri, *Revised Statutes of 1889*, s 2615.

[548] (1886) L.R. I Ex. 265, L.R. 3 H.L. 330. (H.L.). On *Rylands*, see Lecture IV, p. 70.

[549] *Legal Liability For Bursting Reservoirs: The Historical Context of Rylands v. Fletcher* 13 J. Leg. Stud. 209, 221. For more of Simpson's comments on *Rylands*, see **Appendix 11**.

[550] 24 S.W. 591, 596 (1893).

> legislature is powerless to enact laws which will give ample protection to citizens against fires?[551]

The railroads themselves referred to statutes creating strict liability for damages without negligence as imposing a penalty on them.[552] Some courts rejected this characterization, steadfastly refusing to admit that the law was "penal",[553] but in *McCandless* v. *Richmond & D. Rwy. Co.*, the Supreme Court of South Carolina frankly said that its statute incited railroads to take care not to burn other people's property by "providing a *penalty* for failure to do so".[554]

In some states, when a railroad started a fire, it was not even allowed to raise the defence that it had not been negligent. Where the railroads were allowed to raise this defence, the burden of proof split because the allegation that the railroad had burned someone else's property was seen as quasi-criminal. Judge Thompson, in his contemporary **Commentaries on the Law of Negligence**, expressed the feeling of *guilt* many people had about these cases.

> The meadow, the stock or the barn of the miserable farmer has been burned up by the railroad company, for its own profit, and the farmer, in his misery and wretchedness, finds himself without any other remedy than to rail at the lawyers and judges, or to put dynamite on the railroad track.[555]

A Political Explanation

The railroad fire cases were quasi-criminal; when a farmer succeeded in one of these actions, the railroad was not just found liable for burning the farm, it was found guilty of burning the farm. If we do not see these cases this way, if we do not think of the courts as splitting the burden of proof because of the presumption of innocence, we must think of the courts as splitting the burden of proof in order to make it harder for farmers to succeed and easier for railroads to escape liability.

I do not entirely reject the view that law is political. I have no doubt that in the railroad fire cases the courts were motivated to split the burden of proof, at least in part, by politics, but I think it is wrong to see law as *totally* a matter of politics. Law is also a matter of reason, and the railroad fire cases do not have to be understood in political terms. These cases were perceived at the time as quasi-criminal. It is important to

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[551] Ibid.

[552] Id. at 597, 598.

[553] E.g. *Union Pacific Rwy Co.* v. *De Busk*, 20 Pac. 752.

[554] 16 S.E. 429, 433.

[555] Judge Thompson's comment is quoted in one of the many railroad fire cases I read. I neglected to note of which one and have been unable to locate the original book.

understand this, partly for intellectual clarity about the law, but also because it can help us understand a modern case that seems to be political.

Wards Cove Packing Co. v. *Antonio*[556] is a decision of the U.S. Supreme Court. In *Wards Cove*, a group of cannery employees alleged that the company was discriminating in its hiring practices. The employees said there were two classes of workers: "cannery" and "non-cannery". Non-cannery workers were paid more than cannery workers and, at the remote factory where the packing was done, the cannery and the non-cannery workers were housed in different dorms and fed at different mess halls. Non-cannery workers were primarily white; cannery workers were primarily non-white.

The American courts have developed two theories of action under Title VII of the 1964 *Civil Rights Act*. The plaintiffs in a discriminatory employment practices action can allege that the employment practice they challenge was meant to be discriminatory, or they can allege that the practice, whether or not it was meant to be discriminatory, has a disparate impact on their racial group. The courts have said that such a practice is forbidden by the act, unless there is a business justification for it.

In *Wards Cove* the U.S. Supreme Court held that if the employees establish a proper statistical case of disparate impact, the evidentiary and ultimate burdens of proof split.

> [T]he employer carries the burden of producing evidence of a business justification for his employment practice. The burden of persuasion, however, remains with the disparate impact plaintiff.[557]

Wards Cove says that at the start of the trial, the employees have the united evidentiary and ultimate burdens of proving that a particular employment practice is discriminatory. If the employees meet the evidentiary burden of proving a disparate impact, the united burden of proving a business justification splits. The burden of producing evidence that there is a business justification for the practice shifts to the employer, but the persuasive burden of proving, on a balance of the probabilities, that there is no business justification for the practice, remains with the employees.

There was a dissenting opinion in *Wards Cove* saying that if the employees met the evidentiary burden of showing that an employment practice had a disparate impact, then the united evidentiary and persuasive burden of proving that there was a business justification for that practice should shift to the defendant employer.[558] On the majority view, if the employer produced evidence of a business justification for an employment practice that had a disparate impact, and the trial judge was unable to decide whether the practice was justified or not, the employees would lose. Under the minority view, if the

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[556] 490 U.S. 642 (1989).

[557] Id. at 659.

[558] Id. at 661.

court was unable to decide whether the practice was justified or not, the employees would win.

The minority position was the rule before *Wards Cove*. A business justification was seen as an affirmative defence on which the employer had both the evidentiary and the ultimate burdens of proof. The minority in *Wards Cove* says that by splitting the burden of proof, the majority increased the difficulty of suing successfully to rectify employment discrimination, and there is a subtle, unspoken suggestion in the minority opinion that the only reason the majority could come to the conclusion it did was because it was covertly racist.

> Ordinary principles of fairness require that Title VII actions be tried like "any lawsuit."... The changes the majority makes today, tipping the scales in favor of employers, are not faithful to those principles.... Why the court undertakes these unwise changes in elementary and eminently fair rules is a mystery to me.[559]

We do not have to treat the splitting of the burden of proof in *Wards Cove* as a mystery or as motivated by racism. We can instead say that the majority in *Wards Cove*, without being aware of it, viewed the civil action to rectify employment discrimination as quasi-criminal. The majority felt that the employer was being found not just liable for discrimination, but guilty of discriminating. Without being aware of what it was feeling, the majority felt the pressure exerted by the presumption of innocence. Since a person must be presumed to be innocent until proven guilty, even of a quasi-criminal charge, the majority felt it was unfair to require the employer to bear the persuasive burden of proving that it had a business justification for its discriminatory hiring practice. According to the majority, the persuasive burden of proving that the employer did not have a business justification for its discriminatory hiring practice had to be on the complaining employees.

The minority in *Wards Cove* felt that the employer should have the persuasive burden of proving the business justification. This could have been because the minority did not view the charge of employment discrimination as quasi-criminal, but it is more likely that the minority thought that the goal of making it easier to combat employment discrimination justified overriding the presumption of innocence.[560]

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[559] Id. at 678-9.

[560] Thus, in a footnote the minority says,

> The Court suggests that the discrepancy in economic opportunities for white and non-white workers does not amount to disparate impact within the meaning of Title VII unless respondents show that it is "petitioners' fault". This statement distorts the disparate-impact theory, in which the critical inquiry is whether and employer's practices ***operate*** to discriminate. Whether the employer intended such discrimination is irrelevant. (emphasis in the original) Id. at 765.

Lecture II: Appendix 4
Wigmore's Analysis of *Menomenie*

The plaintiff in *Menomenie*[561] proved that the fire had been started by a cinder from the defendant's engine. The evidentiary burden of proof then split and shifted to the defendant. The defendant had the burden of introducing enough evidence to rebut the *prima facie* evidence of negligence and the defendant produced witnesses who testified that the engine had been in proper working order, that it had been properly maintained and properly driven. This was, of course, enough evidence to meet the defendant's evidentiary burden of proof and send the case to the jury, where the persuasive burden of proof was on the plaintiff.

In *Menomenie* the jury found that the plaintiff had met the persuasive burden of proof. The jury decided that the railroad had been negligent. When the defendant appealed, the Court of Appeal vacated the jury verdict and substituted a verdict for the defendant. The Court of Appeal held that any reasonable jury would have had to believe the evidence offered by the railroad company. The testimony of the defendant's witnesses had not been contradicted and the court said the jury was not free to disbelieve the evidence for no reason.

I find this case quite troublesome. All the evidence offered by the railroad came from its employees. Maybe the jury thought the railroad could apply enough pressure to its employees to make them say what it wanted them to say. This would be especially true when saying anything else would have meant that the employees had not done their jobs. The jury may have thought the engineer would be reluctant to say, "I drove the train too fast." It may have thought the fireman would be reluctant to say, "I didn't rake the coals back from under the smokestack." It may have thought the mechanic would be reluctant to say, "The engine was not properly serviced by me."

The jury saw the witnesses and decided not to believe them. The Court of Appeal did not see the witnesses, but decided that the jury *had* to believe them. This is not the purpose of the evidentiary burden of proof. The reason we have the evidentiary burden of proof is so a court can direct a jury to find *against* the party with the ultimate burden of proof.

We split the burden of proof in a criminal case because of the presumption of innocence, but splitting the burden of proof in a criminal case does not allow a judge to direct a jury to find *for* the prosecution. It merely enables the judge to say a certain issue will not go to the jury, and therefore the prosecution does not have the burden of proof on that issue. If we split the burden of proof in a civil case, we are using the evidentiary burden of proof to make it possible for a judge to direct a verdict *for* the party with the ultimate burden of proof.

I do not think it is theoretically sound to split the burden of proof in a civil case unless an imputation of guilt is involved. I think the only reason courts say they can do it

[561] (1895) 91 Wis. 447, 65 N.W. 176, cited in Wigmore's 1st ed. at Vol. IV, sec. 2487, n. 8, p. 3529.

is because **Wigmore** not only said it could be done, but said it was natural to do it. **Wigmore** is explicit on this point. He says:

> Suppose ... the proponent is able to go further and to adduce evidence which if believed would make it beyond reason to repudiate the proponent's claim, - evidence such that the jury, acting as reasonable men, must be persuaded and must render a verdict on that issue for the proponent. Here the proponent has now put himself in the same position that was occupied by the opponent at the beginning of the trial, i.e. unless the opponent now offers evidence against the claim and thus changes the situation, the jury should not be allowed to render a verdict against reason, - a verdict which would later have to be set aside as against evidence. The matter is thus *in the hands of the judge again*, as having the supervisory control of the proof; and he may now, as applying a rule of law, *require the opponent to produce evidence*, under penalty of losing the case by direction of the judge. Thus, a duty of producing evidence, under this penalty for default, has now arisen for the opponent. It arises for the same reason, is measured by the same tests, and has the same consequences as the duty of production which was formerly upon the proponent.[562]

With all respect to Wigmore, there are two things wrong with what he says. The first comes at the very beginning of his comment. "Suppose," he says, "the proponent is able to go further and to adduce evidence which *if believed* would make it beyond reason to repudiate the proponent's claim .... "(Emphasis added). Whether or not the evidence should be believed is for the jury to decide, not for the judge. The second mistake Wigmore makes is saying, "the proponent has now put himself in the *same* position that was occupied by the opponent at the beginning of the trial". (Emphasis added)

This is not correct. When the burden of proof splits, the defendant is *not* in the same position the plaintiff was in at the beginning of the trial. At the beginning of the trial, the plaintiff has *both* the evidentiary and the persuasive burden of proof. When the burden of proof splits, the defendant *only* has the evidentiary burden of proof. Directing a verdict for the defendant when the plaintiff fails to meet the evidentiary burden of proof is directing a verdict *against* the party with the persuasive burden of proof. Directing a verdict for the plaintiff when the defendant has the evidentiary burden of proof is directing a verdict *for* the party with the persuasive burden of proof.

In one case, we are saying that *even if* the jury believes the evidence offered by the party with the evidentiary burden of proof, it cannot find in his or her favour. In the other, we are saying the jury *must* believe the evidence offered by the party with the evidentiary burden of proof. These are very different. One does not take the issue of credibility away from the jury; the other does.

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[562] (Chadbourne rev. 1981) Vol. IX,, sec 2487, p. 294. This statement is contained in every edition of **Wigmore on Evidence**, e.g. 1st Canadian Ed. 1905, Vol. IV, sec. 2487, p. 3527. (emphasis in the original).

Lecture III: Appendix 5
An Informal Approach to Probate

In *Simkins* v. *Simkins Estate*, essentially, the same thing happened as in *Re Brown*.[563] The testator signed in front of one witness, who then signed. Then a second witness was called in. The testator acknowledged his signature in front of both witnesses and the second one signed. On strict theory, the will should have been declared to be invalid because the second witness did not sign again, after the acknowledgement. The court refused to apply strict theory.

> In the case at bar there can be no doubt of the authenticity of the will, no doubt whatsoever of the fact that the testator signed it and no doubt whatsoever that he acknowledged his signature in the presence of two witnesses, and no doubt whatsoever that the witnesses signed and saw each other sign. The only lack of formality consisted in the fact that one witness did not sign the document on a second occasion after he had already signed it once upon the occasion when he saw the testator affix his signature. To rule such a will invalid is an absurdity and, what is worse, a total defeat of the acknowledged intent of the testator by means of a document that complied with all the formalities save and except the exact sequence, that have been held to be necessary. I do not choose to follow such decisions when a rational alternative more compatible with justice, the will of the testator and the substance of the statute is open to me.[564]

This decision is *strikingly out of line* with the ordinary law of succession. Simkins *intended* to make a valid will, but he did not. It is not as if Simkins were unaware that the law of wills was technical. The way he acted shows that Simkins knew how technical the law of wills was. Simkins failed to conform to what he knew was a technical requirement. The judge admits as much when he speaks of "the only *lack* of formality" and says "the document complied with all the formalities *save and except* the exact sequence."

The document did *not* comply with *all* the formalities. Declaring this will to be invalid would have disappointed the beneficiaries, but it would not have defeated Simkins' own expectations or his intentions. On the contrary, to declare this will invalid would have affirmed Simkins' expectations and intentions. In general, this is what the law of wills does.

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[563] (1992), 67 B.C.L.R. (2d) 289 (B.C.S.C.).

[564] Id. at 295-6.

Lecture III: Appendix 6
A Hard Case of Intestacy

Imagine an old woman who lives with her great niece, a little girl of five. The little girl is the granddaughter of the old woman's sister. The sister and her daughter, the little girl's mother, both died in a car accident and the little girl was injured. She walks with a limp and has severe emotional problems. Luckily, the old woman is very wealthy and can provide for her. The old woman and the little girl are very close; they have become like mother and daughter since the little girl moved in.

Let us say the old woman had no spouse and no issue and that her father and mother are both long dead. Let us say further that she had four brothers and sisters. One sister is alive and has no children. One brother is alive and has two sons. One brother is dead but leaves a living son and a daughter. The last sister, the great niece's grandmother is, of course, gone and so is the great niece's mother. This is a complicated family, but the law of intestacy has no trouble dealing with it.

The B.C. *Estate Administration Act* [565] provides,

> 86 (1) If an intestate dies leaving no spouse or issue, the person's estate goes to the person's father and mother in equal shares if both are living.
>
> (2) If either of the person's mother or father is dead, the estate goes to the survivor.
>
> 87 (1) If an intestate dies leaving no spouse, issue, father or mother, the person's estate goes to the person's brothers and sisters in equal shares.
>
> (2) If a brother or sister is dead, the children of the deceased brother or sister take the share their parent would have taken if living, but further representation must not be admitted.

The law of intestacy tells us, with mathematical precision and reliability, that one third of the old woman's estate goes to the old woman's living sister, one third goes to her living brother, and one third is divided equally between the son and daughter of the dead brother. The great niece gets nothing. If someone says this is wrong, that is the whole point of this lecture. Succession law is peculiarly formalistic.

[565] R.S.B.C., 1996, ch 112.

Lecture IV: Appendix 7
On the 30th, or at the latest, the 31st

I love this phrase, but have a great deal of difficulty understanding it. To speak of "the 30th or 31st" would not trouble me. It is the phrase "at the latest" that makes the "the 30th or 31st" puzzling.

If the court had said the letter should have been mailed on the 30th or the 31st, I would automatically have read the "or" as saying that the statute allowed the letter to be sent on 30th in certain circumstances *and* on the 31st in other circumstances. I would, in other words, have read the "or" as conjunctive. The phrase "at the latest" makes the "or" alternative and this is *not possible in a legal rule*. Just as legal rules must start with a universal, they must end with a particular, not an alternative.[566] The law must be either

1) the letter should have been mailed on the 30th or
2) the letter should have been mailed on the 31st.

It cannot be both.

If the letter should have been mailed on the 30th, then it is legally wrong to say, it could have been sent *as late as* the 31st. If the 30th was the deadline, the 31st was *late*. By contrast, if the letter *could* have been mailed on the 31st, then it is legally wrong to say it *should* have mailed on the 30th. Legally, to say it "should" have been mailed on the 30th means, if it isn't mailed by the 30th, it's late.[567]

I suspect that what the court had in mind was that it is not absolutely predictable how long it will be till a registered letter is *delivered*, but if that is so, there has been a glaring error in my analysis to this point. The date that matters legally is the date the letter *arrived*, not the date it was *mailed*. If it takes 3 or 4 days for a registered letter to arrive, a *reasonable* person would have mailed the letter "on the 30th, or at the latest, the 31st. This is not a legal rule. It is a statement of fact and is, at best, *obiter*. It is interesting advice by the court on when to mail registered letters, but otherwise, it is irrelevant.

That the "reasonable person" does not belong in this case can be seen clearly in the reasons the Supreme Court of Canada gave for invalidating the expropriation:

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[566] I should not say "legal rules" here but "legal rules of a certain sort". One can confer discretion with an alternative or even a range of posssible decisions, as for instance, the *Criminal Code* does when it says a person convicted of a certain offence may be sentenced to "not more than X." The point of the Supreme Court judgment, about to be quoted in the text, is precisely that there was no discretion in the statute requiring the city to send a letter "on the 30th, or at the latest, the 31st".

[567] That something is "late" is a legal operative, like "valid". Something is either late or not, valid or not. Just as it does not matter *how* valid something is, it doesn't matter how *late* something is.

> It may be said that the error of the respondent was a small one and that the departure from the statutory provisions regarding service of notice was not, in the circumstances of this case, significant. It may be said that the mailing was … only three days late …. But then the question arises: how far should the courts go in relieving municipalities from following mandatory provisions regarding service where the interest of private citizens is threatened? If an error of three days is forgivable, then what about one of four, or five, or ten days? Surely the line must be drawn … where the legislature chose to put it and not where individual judicial discretion may fix it on a case-by-case basis.[568]

[568] *Costello* v. *Calgary*, 143 D.L.R. (3rd) 385, 395.

Lecture IV: Appendix 8
Predicting the Future

Predictions about the future depend on presumptions. I will examine two predictive presumptions that affect the damages awarded in negligence. The first deals with what are called "contingencies". A small amount of background is necessary to understand how contingencies work.

Damages were once awarded globally. The plaintiff received a sum that was not divided up in terms of different losses. Now damages are awarded under different "heads" of damages.

1) Special damages are out-of-pocket expenses, which can be calculated precisely at the time of trial.
2) General damages are
   a) loss of future income,
   b) cost of future care, and
   c) pain and suffering.

Determining how much to award for pain and suffering has always been a problem because there is no exchange between money and pain and suffering. Loss of future income and cost of future care are also a problem, but for a different reason. Both of these losses are monetary or pecuniary losses, but they are *future* losses and so require predictions. How long will the plaintiff be out of work? How long will the plaintiff need care?

In 1978 the Supreme Court of Canada decided a trilogy of cases that determined how long-term damages were to be calculated.[569] All the cases involved young people whom one could expect to live for a long time. They had been completely disabled in accidents and the damage awards had to compensate these young people for their future dependency. In *Teno* v. *Arnold*, the plaintiff was a 4½-year-old girl.

> There can be no evidence whatsoever which will assist us in determining whether she would have become a member of the work force or whether she would have grown up in her own home and then married. There can be no evidence upon which we may assess whether she would have had a successful business future or have been a failure. Since the court is bound not to act on mere speculation, I do not see how this court could approve the course taken by Zuber J.A. which simply amounted to assuming, as he frankly said, "in the absence of any other guide," that the infant plaintiff would follow the course of her mother who was a primary school teacher

[569] *Andrews* v. *Grand & Toy Alta. Ltd.*, [1978] 2 S.C.R. 229, 8 A.R. 182, 3 C.C.L.T. 225, [1978] 1 W.W.R. 577, 19 N.R. 50, 83 D.L.R. (3d) 452; *Thornton* v. *Bd. of School Trustees (Prince George)*, [1978] 2 S.C.R. 267, 3 C.C.L.T. 257, [1978] 1 W.W.R. 607, 19 N.R. 522, 83 D.L.R. (3d) 480; *Teno* v. *Arnold*, [1978] 2 S.C.R. 287, 3 C.C.L.T. 272, 19 N.R. 1, 83 D.L.R. (3d) 609.

> with an income of $10,000 per year. On the other hand, I do not think we can assume that a bright little girl would not grow up to earn her living and would be a public charge.…[570]

> To award an annual loss of income of the sum of $5,000 is to make an award of an amount which, in the present economic state, is merely on the poverty level, yet I cannot justify an award based on an amount of $10,000 as did Zuber J.A. I think we would do justice to both plaintiff and defendants, and I find it equitable, to determine that the infant plaintiff would, at least, have earned $7,500 per year for her business life.[571]

In the Court of Appeal, Zuber J.A. had presumed a little girl follows in her *mother's* footsteps. The Supreme Court rejected this presumption, not because of its gendered nature, but because it was "speculative", meaning too plaintiff-friendly. The Supreme Court presumes it is "equitable" to split the difference, but there is no "difference" to split. The $5,000 is as speculative as the $10,000. And the $7,500 comes from nowhere. I pass over this level of presumption, inference, speculation and equity to get to "contingencies":

> I am of the view that annual amounts should only be calculated from the time the infant plaintiff would have reached 20 years of age until she would have reached the normal retirement age in industry today of 65 years. Moreover, when we assume that the plaintiff would have been a wage earner, we must also consider that all wage earners are faced with the possibilities of failure through illness short of death, financial disasters, personality defects, and other causes. I therefore, believe that we should allow a 20% contingency deduction from the $7,500 to make a net annual loss of income of $6,000….[572]

The figure of $7,500 was picked virtually at random. What sense can it make to reduce it by 20% for "contingencies"? "Contingencies" have no reality when applied to a figure plucked out of the ether and even if a figure has got some basis, the basis itself, mathematically precludes a deduction for contingencies.

Suppose there is evidence to indicate what career a plaintiff might pursue. A plaintiff might already be launched on a particular career. If the court knows what career it is looking at, an average figure for net annual loss of income can be ascertained. But once the court has arrived at an *average* income for a particular career, there is *no room* for contingencies. An average takes contingencies into account. Taking all the contingencies into account is precisely what it means to call it an "average".

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[570] [1978] 2 S.C.R. 287, 329.

[571] Id. at 331.

[572] Ibid.

The deduction of 20% for contingencies was not limited to *Teno* v. *Arnold*. The Court deducted contingencies in all three cases and did so for cost of future care as well as loss of future earnings. This is the rule. A 20% contingency is taken off as a matter of course. In *Andrews* v. *Grand & Toy*, Dickson J. said,

> The whole question of contingencies is fraught with difficulty, for it is in large measure pure speculation. It is a small element of the illogical practice of awarding lump-sum payments for expenses and losses projected to continue over long periods of time. To vary an award by the value of the chance that certain contingencies may occur is to ensure either over-compensation or under-compensation, depending on whether the event occurs. In light of the considerations I have mentioned, I think it would be reasonable to allow a discount for contingencies in the amount of 20% ….[573]

One can accept everything Dickson said, and still ask why contingencies are always *deducted*? Don't good things happen to people? Without meaning to be flip, I suggest that contingencies are negative because judges are old people and old people presume that if something unexpected happens, it is going to be bad.[574]

The Value of Money

The second predictive presumption I will deal with is very different. It does not concern what is going to happen in any particular person's life. It concerns something that seems somehow more predictable: the value of money. Since the plaintiff receives a lump sum that can be invested to generate interest, a court must determine the long-term value of money. This is a question of fact, on which the evidence of actuaries is used. Actuaries are almost like scientists in financial matters, and the point I wish to make is that even about this quasi-scientific fact, presumptions are critical.[575]

There was virtually no law on damages until the end of 19th century. Before that, the question of damages was left entirely to juries. The judge would sum up the facts of the case, but give the jury no guidance on damages. It was the jury's task to arrive at a figure that seemed reasonable, and no explanation of the figure the jury gave was required. The jury simply came up with a figure and that was it.

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[573] [1978] 2 S.C.R. 229, 249-50.

[574] In his description of the character of old age, Aristotle says: "Elderly people who have passed their prime … have lived many years, and have been deceived or have erred more often, and as most things are disappointing … they think evil …. [E]vil thinking is to put the worst construction upon everything." **Rhetoric**, II, xiii, 1-4. Jebb transl. (Cambridge, 1909)

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[575] The substance of my comments and some of the actual language is drawn from a lecture on damages, given to first year students at the UBC Faculty of Law in 2000. The lecture was given by Mr. Justice Kenneth McKenzie of the B.C. Supreme Court.

This rough-and-ready approach to the assessment of damages changed gradually beginning in the late 1800s.[576] A major change was required in the 1960s and 70s because of two developments *outside* law. One was the dramatic advance that occurred in the medical treatment of people who had suffered spinal cord injuries that left them without control of their arms and legs. The change was simple. Up until this time, people with quadriplegic injuries generally died. Around this time, they began to survive, as did people with catastrophic brain injuries.

Both kinds of injuries occur in accidents that lead to litigation and since the victims of these accidents were often quite young, the courts were faced with a brand new problem. Damages had to be awarded, not only for the loss of income, but for the cost of caring for people who were virtually completely unable to care for themselves. These damages had to cover prospective future periods ranging anywhere up to fifty years, *in an inflationary environment*.

Inflation was the second big external change that confronted the law in the 1960s and 70's. Inflation poses a tremendous challenge to law.[577] To examine how Canadian courts met this challenge we must first look back at the trilogy of damage cases decided by the Supreme Court in 1978. The trial awards in these cases were very large. The trial judge in *Thornton* awarded $1,122,000 for the cost of future care.[578] This was a staggering sum at the time. Nobody had seen a damage award approaching this sum in Canada.

The cost of future care in *Thornton* was discussed at the B.C. Court of Appeal level, by Mr. Justice Taggart in these terms:

> The evidence makes it certain that the respondent must receive constant care and attention for the rest of his days if he is to hope to live the number of years which an uninjured person of his age might, on the average, expect to live. What is in issue, however, is whether that kind of care should be given to the respondent in a home of his own, without any sharing of the substantial costs involved by other persons having similar injuries which require a similar level of care. The medical evidence indicates that there are two basic considerations which must be met in caring for the respondent. The first and most important, is attention to his physical needs, such as turning every two hours, transfer of the respondent from bed to wheelchair to specially designed vehicle and back again, and

[576] Professor Simpson's comments on the process by which law is engrafted on fact are described in **Appendix 11.**

[577] The most dramatic inflation to challenge the law was that which occurred in Germany after World War I. After the war, prices were *1.5 trillion times* what they had been before the war. On the legal response to this kind of inflation, see K.S. Rosenn, **Law and Inflation** (U. Pa. Press, 1982).

[578] [1975] 3 W.W.R. 622, 57 D.L.R. (3d) 438.

> personal care in the way of washing, dressing, bowel and urinary tract attention and other personal needs. The second consideration is more nebulous, and relates to the effect on the respondent of the surroundings in which the physical care is received. The doctors all describe the "optimum" level of care as being care in his own home rather than in a chronic care or auxiliary hospital. In his own home, which might be established in a house or apartment, the respondent could exercise some responsibility for and control over his daily life, whereas, in an institutional setting, he would be subject to the rules and regimen necessarily imposed on patients by management of the institution.[579]

The doctors had all recommended optimum care, i.e home care, and the trial judge had found as a matter of fact that "Gary Thornton has a good chance of living a normal life expectancy, but this 'good chance' is contingent upon the existence of optimal care."[580]

The Court of Appeal flinched at the cost. It said home care was too expensive and the plaintiff should only have institutional care. It reduced the award from $1,122,000 to $210,000. In the Supreme Court, Dickson, J. said,

> Taggart J.A. made this trenchant finding: "I have no doubt that the increase in life expectancy would be enhanced if the ideal level of care proposed for the respondent is available." He added: "The question is, however, whether the ideal level of care with its attendant cost is one which should be imposed upon the appellants." There, starkly, is the issue. Thornton will live longer if he receives the care doctors recommend. Is the cost too much for the respondents to bear? Ability to pay is advanced as the reason for denying the appellant the care the medical experts say he needs. As I stated in the *Andrews* case, it is an error of law to regard the ability of the defendant to pay as a relevant consideration in the assessment of pecuniary damages.[581]

As I pointed out earlier, irrelevance is an irrebuttable presumption. The Court of Appeal acted on one presumption. The Supreme Court of Canada on a much more plaintiff-friendly one. The principle of *restitutio in integrum*, Dickson said, required proper compensation for the injuries suffered by the victim. In other words, the Supreme Court opted for home care.

But it increased damages to only $650,000 and this was a long way short of $1,100,000, which the trial judge had awarded. The difference had to do with inflation. In order to get some perspective on this, it is helpful to go back to an earlier B.C. case.

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[579] (1976), 73 D.L.R. (3d) 35, 40.

[580] (1975), 57 D.L.R. (3d) 438, 460.

[581] [1978] 2 S.C.R. 267, 277.

Bisson v. *Powell River* concerned another quadriplegic injury resulting from a diving accident in which the plaintiff broke his neck.[582] The jury in this case had awarded $286,000, $236,000 of which was for future pecuniary losses. This figure was based on certain assumptions about interest and inflation over the 28-year period of the plaintiff's life expectancy. [583]

The plaintiff in *Bisson* called an actuary to testify on the factual question of quantum. The plaintiff was going to receive a lump sum to cover all future costs and losses. The courts presume the plaintiff will invest this money so as to generate income or interest and therefore, discount the losses to get a present sum, which with interest will yield what it has been determined the plaintiff should receive yearly. The plaintiff lives on the principle and interest of a fund that reduces to zero at the date it was predicted the plaintiff would die.

The actuary did a capital sum calculation. The actuary assumed that interest rates would average 5% over the 28 years. In other words, the plaintiff would be able to earn 5% on his capital sum (or the portion remaining of it after yearly expenses had been met). This is called the "nominal interest rate". To find the "real" interest rate, one has to allow for inflation. As the plaintiff's lump sum award is earning interest, dollars are losing purchasing power, so the plaintiff is falling behind. The difference between the "nominal interest rate" and the rate of inflation gives the real interest rate.

The actuary assumed an inflation rate of 3%, meaning the plaintiff would need 3% more just to stay in the same place. When the real interest rate of 2% (5% minus 3%) was applied to the amount of the plaintiff's costs and losses over the next 28 years, it yielded the figure of $236,000 for pecuniary losses. This was a very large award by the standards of the time. It was said to be the largest award in Canada or England up to that date, and when the case went to the Court of Appeal, the judges, looking at the matter for the first time and without the benefit of hindsight, could not accept the implications of inflation. They choked on the analysis and went into a state of denial. The judge who wrote the leading opinion in *Bisson* at the Court of Appeal said,

> Inflationary trends and rises in costs of living are factors which the jury might properly consider in their assessment, but to accept as a matter of course in assessing damages, a decrease in the value of our money at 3% per annum cumulatively during the next 28 years is unwarranted as speculative, involving a conclusion that governmental measures to control inflation during the next generation will be utterly fruitless.[584]

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[582] (1967), 62 W.W.R. 707, 66 D.L.R. (2d) 226.

[583] In 1967, the life expectancy estimated for the plaintiff was 28 years. This figure shows how rapidly medicine was changing in this period. 10 years later, at the time of the trilogy, the life expectancy for someone of about the same age with the same injuries was virtually normal, 50 years plus.

[584] (1967), 66 D.L.R. (2d) 226, 238.

The Court of Appeal slashed the award of $286,000 by $112,000.

When we do not know what is going to happen, we have to make presumptions. Experience shows that the presumption the Court made in 1967 was completely false. Cumulative inflation since the mid-sixties is at least 300%.

The court in *Bisson* got inflation wrong and so did the Supreme Court in *Andrews.* I will not discuss the Supreme Court's mistake in detail, but because this is a question of fact, I will note that the mistake the Supreme Court made involved the treatment of *evidence*. In *Andrews* Dickson J. said, "evidence was specifically introduced that the former head of the Economic Council of Canada, Dr. Deutch, had recently forecast the rate of inflation at 3½% over the long term future".[585] At trial, an actuarial witness said he based one of his conclusions on Dr. Deutch's forecast.[586] This means Dr. Deutch's forecast was *hearsay* and one of the big risks always advanced as a reason for the exclusion of hearsay evidence actually occurred in this case. Dr. Deutch's comment had been taken out of context and as a result, the damages were way off.

Hearsay aside, it would have been impossible in 1978 to presume 300% inflation.

[585] [1978] 2 S.C.R. 229, 259.

[586] (1974), 54 D.L.R. (3d) 85, 102.

Lecture IV: Appendix 9
Negligence and Contributory Negligence

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Negligence and contributory negligence are treated as if they were equal forces, working in opposite directions. The test for both is the same. A defendant is negligent if he or she did not take the care a reasonable person would have taken and a plaintiff is contributorily negligent if he or she did not take the care a reasonable person would have taken. When the defendant is the owner or driver of a motor vehicle and the plaintiff is a pedestrian, a cyclist or a passenger in the defendant's vehicle, this view of contributory negligence does not conform to general tort theory.

A defendant is only negligent if he or she owed a duty of care *to the plaintiff*. That the defendant owed a duty of care to *someone else* will not do. This is the point of Cardozo, C.J.'s famous decision in *Palsgraf* v. *Long Island Railroad Co.*[587] A defendant is only liable if he or she breached a duty owed *to the plaintiff*.

But when a plaintiff is found contributorily negligent, it is not for breaching a duty of care owed *to the defendant*. The duty the plaintiff breaches is a duty owed *to him or herself*. The defendant is allowed to piggyback duties in a way the plaintiff is not.[588]

This is a highly technical point difference between negligence and contributory negligence. A less technical difference is that a careless driver of a motor vehicle is *a danger to everyone else*, whereas a careless pedestrian, cyclist or passenger, in general, poses no danger to anyone *except* him or herself. Negligence by a driver is the mishandling of a two-ton metal object travelling at high speed. Contributory negligence by a pedestrian, cyclist or passenger is carelessness, but it is *not* an equal force working in an opposite direction.

When both parties to a motor vehicle negligence action are drivers, the balancing of negligence against contributory negligence seems more proper, but even here it is not right because a finding of contributory negligence against a plaintiff *has a different practical result* from a finding of negligence against a defendant. Plaintiffs actually lose money if they are found contributorily negligent. Defendants do not. The damages attributed to a negligent defendant are always paid by an insurance company.

The naming of the owner or driver of a vehicle as the defendant in a motor-vehicle negligence action is a *modern legal fiction*. In Lecture V, I will explain that legal fictions are allegations that cannot be denied, though everyone knows they are false. The examples I use there of legal fictions come from the middle ages and were allegations by the plaintiff of certain facts that gave the court jurisdiction. Though they were false, and

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[587] (1928), 248 N.Y. 339; 162 N.E. 99. This case is discussed at p. 98.

[588] Andrews J. pointed this out in dissent in *Palsgraf*. Id. at p. 102.

everyone knew they were false, the defendant could not deny, or as it was said, "traverse" them.

The modern legal fiction I am describing is even stronger because the plaintiff is not *prohibited from denying* a false allegation by the defendant. The plaintiff is actually *compelled to assert* the fiction. The plaintiff in a motor-vehicle negligence action must name the owner or driver of a vehicle as the defendant, even though everyone knows the real defendant is the insurance company. The only party who could settle the case is the insurance company, counsel for the defendant is instructed by the insurance company and any damages awarded are paid by the company. In some cases, a plaintiff has to actually sue his or her spouse!

Lecture IV: Appendix 10
No-Fault

Restitutio in integrum is a medieval idea that we could not recreate today. It is based on the idea that a plaintiff has a right not to be injured. This idea is as quaint today, as the idea that *any* interference with a neighbour's property is a nuisance. The modern idea is that accidents happen. People have no *right* not to be hit by a car. It is a well-known secret in our society that being hit by cars is just "something that happens to people". The so-called "no-fault" schemes are supposedly directed at the finding of fault in negligence, particularly motor-vehicle negligence, but as I explained, liability, i.e. fault, is very rarely at issue in motor-vehicle negligence actions.[589]

No-fault schemes are really directed at *restitutio*, which requires very high payments to *some* of the people injured in motor-vehicle accidents, namely those who can establish that they were injured by the negligence of someone else. Wouldn't it be better, the advocates of no-fault ask, to equalize the payments to people who have been injured in motor-vehicle accidents? Why should those who can prove negligence get more than those who cannot?

This is a very good argument, but nowhere in it is there a reason for *lowering* the payments to those who can establish negligence. This is an inevitable feature of no-fault schemes. Instead of paying *any*one at what is called the "third-party level", no fault wants to pay *every*one at the "first-party" level. The first-party level is what an insurance company would pay if an insured injured him or herself. This level is *always lower* than what an insurance company (the party of the second part) would have to pay to indemnify an insured (the party of the first part) for having injured a third party.

The so-called "no-fault" schemes are really "own-fault" schemes. They seek to compensate those who are injured by drunk drivers at the same rate that would be paid to the drunk driver if he or she suffered the same injuries. Since drunk drivers are, after all, people, no-fault would not be bad if it did not make the horrible mistake of assuming there is a limited amount of money to be spent taking care of the people who are injured in motor-vehicle accidents. This is the same mistake that was made during the industrial revolution, when workers were prevented from recovering, so that new industries could thrive. There wasn't enough money to build new industries *and* give third-party damages to workers injured by the negligence of employers, so while the courts were very busy making negligence more plaintiff-friendly in railroad accident cases, they were equally busy making it less friendly in work-place accidents.[590] Three legal rules were developed, by courts, not legislatures, which essentially meant workers injured on the job could recover no damages from their employers, no matter how negligent their employers had been.

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[589] See, p. 101.

[590] I think there was a class bias here. Anyone could be injured in a railway accident. Only workers could be injured at work.

1) The "fellow servant" rule provided that if a fellow servant had been even partially negligent, the employer could not be sued.
2) Assumption of the risk provided that if a job was dangerous, an employee was presumed to have voluntarily accepted the danger and given up the right to sue.
3) Contributory negligence was not treated as a matter of proportion. If a worker was found to be in any proportion responsible for his or her own injury, the employer could not be sued.

The unfairness of this led, in the early years of the 20th century, to the development of Workers' Compensation.

But Workers' Compensation is *first-party* compensation, not *third-party* compensation, in Latin, *restitutio*. One example of the difference between the two levels of compensation can be seen in *Andrews v. Grand & Toy*. As we have seen,[591] the Supreme Court of Canada held that a defendant who negligently rendered a plaintiff quadriplegic was obliged to pay the plaintiff enough to allow him or her to live and be cared *for at home*, *rather than in a hospital*. This plaintiff-friendly decision is only possible because of *restitutio*. It is third-party compensation and would *never* be paid under a first-party scheme.

[591] See, p. 181.

Lecture IV Appendix 11
Simpson's Comment on *Rylands*

A.W.B. Simpson points out how odd it is that *Rylands* v. *Fletcher*, a case of strict liability, was decided when the modern law of negligence was being developed. Speaking of the English courts in the nineteenth century, Simpson says, they were espousing

> two apparently antithetical principles of liability. One makes liability depend on proof of negligence and fault and in the absence of such proof leaves the injured party without a remedy…. The other, that of strict or absolute liability, differs in permitting the injured party to recover compensation for loss arising from the defendant's conduct or activity even though negligence … cannot be proved.[592]

One explanation for this anomaly, Simpson says, is that

> The old common law proceeded on the basis that a man acted at his peril; this harsh doctrine was progressively relaxed in the nineteenth century with the reception of the principle of liability for fault only. The law was thus moralized, and *Rylands* v. *Fletcher* appears as an atavistic decision, a throwback or survival from more primitive times.[593]

Another, and Simpson says, better explanation is that

> Before the nineteenth century, questions of fault, contributory fault, assumption of risk, standards of proper behavior, remoteness of damage, and so forth, certainly arose in litigation, and this is in the nature of things. But they were treated as jury questions, to be handled in the main by lay common sense, and insofar as judicial guidance was given to the jury about how they should be handled, such guidance was not regularly a subject of review. There was in consequence little or no law on these matters, and what happened in the nineteenth century was not the substitution of new law for old law, but the creation of law where there had been none before.[594]

Simpson's idea is that in *Rylands* v. *Fletcher* the court decided to turn something that had been a question of fact for the jury into a question of law for the judges.

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[592] *Legal Liability for Bursting Reservoirs: The Historical Context of Rylands v. Fletcher,* 13 J. Leg. St. 209, 210 (1984).

[593] Id. at 214.

[594] Id. at 215.

Lecture VI: Appendix 12
Twining's Assumptions

Twining's model actually has 27 points. The last three are not part of the rational model; they are a profession of faith in it.

24. Generally speaking this objective is largely achieved
25. in a consistent
26. fair
27. and predictable manner.

Given how critical I sometimes am of law, how skeptical I often sound when I speak of it, I am surprised to find that I too believe "generally speaking", the objective described in the rationalist model of adjudication is "largely achieved in a consistent, fair and predictable manner". I hasten, because of my politics, to stress the two qualifications g*enerally* and *largely*. I am fully aware that the ideal is not met all the time. I live in Canada and there have been some terrible miscarriages of justice in Canada. There has been systematic oppression of First Natives, women, poor people, gays and lesbians. There is not as much of this as there used to be, and thank God, there never was as much here as there was in some places, but there is no sense hiding from the facts. Legal adjudication in Canada does not completely live up to the ideal in Twining's model and if you were on the outside looking in, you doubtless would not believe it "generally" or "largely" did. You might even think it was not an ideal, just a pretense.

I believe I am speaking exclusively to people who, like myself, mostly believe that most of the time in legal trials the law is sort of applied to the facts in a more or less rational way. I think this is true in England, Australia, France, Italy, Japan and many other countries. I even think it is true in the United States, which I left in 1970, at least in part because I thought it was not.[595]

If you do not believe this, if you believe either that law is *solely* or even *primarily* a pretense to cloak the exercise of power or that the law is inherently and irredeemably irrational, I am amazed that you are reading this book and will not try to disabuse of your views, for I share them. I am of two minds about everything I think about. We all are. Not one of the 27 points in Twining's model is dense, in the sense of being hard to understand, but together, they are "thick". They present an appearance of rationality that caters to our irrational mind.[596] We wish rationality were as thick as the list, but rationality, like everything we humans value, is thin. It exists for a snap of the fingers. It is momentary, not stationary.

The way Twining breaks his model down goes beyond merely making it understandable. It *emphasizes* the fact that the statement is broken down. It draws one's

[595] S. Wexler, *Practicing Law for Poor People*, 79 Yale L.R. 1049 (1970).

[596] J. Frank, **Land and the Modern Mind** (Anchor, 1963) passim.

attention to each of the little bits, and hence, means that rationality is not *one* thing: it is composed of tiny little bits. Keep each piece pure and isolated and when you put them together, you have rationality.

Twining is not unaware of this. In the pages preceding the rationalist model of adjudication, Twining sets out a series of propositions that present the "main epistemological and logical *assumptions*" of the rational model of adjudication. There are three groups of assumptions. The first is headed "epistemological assumptions" and begins with

> (a) Events and states of affairs occur and have an existence independent of human observation; true statements are statements which correspond with facts, i.e. real events and states of affairs in the external world.

This is keeping the little bits that go to make up rationality pure and isolated.

The second in the three groups of assumptions is called "assumptions about fact-finding in adjudication." I won't give an example of these assumptions and include it only to contrast it (and epistemological assumptions generally) with the third group of assumptions about the rational model. The third group is called "reasoning in adjudication".

Why isn't it called "the *assumption* of reasoning in adjudication"? How did the word "assumption" fall out of this "collection of assumptions"? Here is the first proposition:

> (a) A method of adjudicative fact-finding is 'rational' if, and only if, judgements about the probable truth of allegations about the facts in issue are based on inferences from relevant evidence presented to the decision maker.

Why is the word "rational" presented in single quotes? Twining uses the word over and over again in his work, and nowhere else does it take quotes. Why here? Are the quotes a sign of the assumption that a method of adjudicative fact-finding can be rational?