Comparative Studies
in Continental and Anglo-American Legal History

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und anglo-amerikanischen Rechtsgeschichte

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The Law of Proof in Early Modern Equity

By

Michael R. T. Macnair

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Herausgegeben von

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Preface

This book is a substantially revised version of my D.Phil dissertation of the same title (Oxford University, 1991). In the course of writing both the thesis and the book I have incurred numerous debts of gratitude, both intellectual and practical. Many will be apparent in the text. My thanks are due in particular to Dr. David Ibbetson, who supervised the thesis, and Professor Colin Tapper and Mr David Yale, who examined it; to Professors John Langbein and Charles Donahue, Jr., and their colleagues, who made helpful critical comments on a paper which tried to summarise my argument; to Professor Nörr, who pointed out the basic flaw in the construction of the dissertation and gave me the fundamental direction for this revision, and more recently for editorial comment; and to Professors Richard Helmholz and Alain Wijffels, who have helped me with civilian sources. Leeds University, Southampton Institute and my present employers, Lancaster University, have all in various ways supported the research, and I am also indebted to the helpfulness of library staff in the Brotherton Library and its Law Library at Leeds, in Duke Humfrey and St Cross in the Bodleian Library, Oxford, and at Cambridge University Library. Last but not least, Sue Owen has put up with the somewhat glacial progress of this project while writing her own thesis and revising it for publication, and has given me helpful literary references and advice on style. For all errors and infelicities in the end product I am, of course, solely responsible.

Michael R. T. Macnair

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Abbreviations used in the footnotes

Citations to the English nominate law reporters follow the conventional abbreviations used in the *English Reports* reprint. The text used is the *English Reports* text unless otherwise indicated. Abbreviated citations to other printed books and manuscripts are listed in the first section of the Bibliography, below. In the dates, letters before dates indicate the law term: M - Michaelmas, H - Hilary, P - Easter, T - Trinity. Dates in Hilary Term are given as e.g. (H1573/4) reflecting varied treatment of the beginning of the year in the sources; other multiple dates indicate prolonged proceedings or uncertainty as to date.

aff'd	affirmed	JP	Justice of the Peace
arg.	arguendo (in argument)	KB	King's Bench
Ass.	Assizes	LK	Lord Keeper
B	Baron (of the Exchequer)	MR	Master of the Rolls
C	Lord Chancellor	NP	nisi prius
CB	Chief Baron	P	Plaintiff
CJ	Chief Justice	QB	Queen's Bench
CP	Common Pleas	rvsd.	reversed
D	Defendant	SC	Same case
Ex	Exchequer	Sjt.	Serjeant
Ex. Ch.	Exchequer Chamber	SP	Same point
Ex (E)	Exchequer, equity side	SR	Same report
Ex (L)	Exchequer, common law side	SS	Selden Society
HL	House of Lords	UB	Upper Bench

Chapter One

Introductory

This book is a contribution to our understanding of two problems in the relationship between the common law and civil law traditions. The first relates to the proof of facts. In modern common law systems, the proof of facts is to a considerable extent governed by legal rules affecting the evidence which can be led to prove a fact; while in modern civil law systems, the trier of fact is generally free from such rules. Why? The explanation is necessarily partly historical, but the traditional view established at the turn of the nineteenth and twentieth centuries and still repeated in modern textbooks[1] is that it is partly functional: the rules of evidence are necessary to control the vagaries of the lay trier of fact, the jury. More recent work has offered historical critiques of this explanation, which move in two different directions: the common law of evidence is to be explained either by the intellectual culture of early modern England and Europe and the place of the proof concepts of the contemporary civil and canon laws within it, or by the dynamics of the common law trial in the later eighteenth century. Missing from both the traditional story, and these more modern approaches, is the role of the english courts of equity and *their* doctrine and procedure in relation to proof.

The second problem is more purely historical: the relationship between common law and civil law in early modern England and the role in this relationship of the equity (here including conciliar) jurisdictions. This is an aspect of the much disputed question raised by F.W. Maitland in his *English Law and the Renaissance*: how far were contemporaries in the early modern period justified in seeing a possibility that the distinctive features of the common law tradition would disappear and English law become merely a variant of the civil law tradition? How far, on the other hand, was common law thought governed by a purely insular *'mentalité'*, as J. G. A. Pocock and D.R. Kelley have argued? The courts of equity, where common lawyers and civilians worked together, are important to this question; but discussions of their relationship to common law and civilian ideas have generally focussed on substantive rather than procedural doctrine.

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[1] E.g. *Cross on Evidence* (7th ed by Colin Tapper, London, 1990), 1-4; P. B. Carter, *Cases and Statutes on Evidence* (2nd ed., London, 1990), 4; M. N. Howard, P. Crane & D. A. Hochberg, *Phipson on Evidence* (14th ed., London, 1990) § 1-02; J. D. Heydon & C. M. G. Ockelton, *Evidence Cases & Materials* (3rd ed., London, 1991), 3; P. Murphy, *Murphy on Evidence* (5th ed., London, 1995), 3.

This book, then, contributes to these discussions a systematic study of the conceptual structure of the doctrine and procedure of proof of facts in the courts of equity, and the relationship of this doctrine to the proof concepts of contemporary civilians (lawyers trained in the civil law tradition, working both in the civil and canon laws). My argument is that contemporaries were right to see the courts of equity as fundamentally civilian in their proof procedure and concepts; and that the earliest phase of the development at common law of rules governing the evidence to be led to a jury was also influenced by civilian proof concepts.

The structure of the study follows contemporary discussions of proof and evidence by both civilians[2] and common lawyers[3] in using the instruments of proof as its organising principle: confessions (Chapter 2), documents (Chapters 3-4), witnesses (Chapters 5-8) and burden and standard of proof and presumptions (Chapter 9). In this chapter I propose to set the scene by identifying in more detail the nature of the two problems identified above and the relevance of equity proof to them; and the nature of the present study and the sources used for it.

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[2] For the civilians, the starting point is the *Corpus Iuris*: D. 22.3, *De Probationibus et Praesumptionibus,* 22.4, *De Fide Instrumentorum* ..., 22.5, *De Testibus,* 42.2, *De Confessis*; C.4.19, *De Probationibus,* 4.20, *De Testibus,* 4.21, *De Fide Instrumentorum* ...; 'Alciatus' 199r ff, confessions, 207r ff, witnesses, 220v ff, documents, 226r ff, presumptions; Maranta 551ff, confessions, 558 ff, witnesses, 583 ff, documents (though the editor Petrus Polleriumas inserts a substantial body of material on documents as an *Additio* to the section on witnesses); Covarruvias *QP* Ch 18, witnesses, Chs 19-22, documents; *Reformatio* 232 ff, documents, 243ff, witnesses, 266ff, presumptions; Vulteius 368r-370r, presumptions & oaths, 370v-371r, confessions, 371v-372v, witnesses, 372v-373v, documents; Wood 310-2, confessions, 312-4, presumptions, 314-9, witnesses, 319-325, documents. This separate treatment of the distinct instruments of proof is also shared by Cotta, Gaill, Clerke, Conset and Ayliffe, but the inference of a conceptual separation is weaker because these works are not organised by proof concepts; Gaill, and Clerke (and hence Conset), may be to some extent structured by the time order of the steps in litigation, while Cotta and Ayliffe are alphabetical.

[3] Common lawyers mainly distinguished "evidence", meaning documents, from witnesses: Co.Lit. f 6b (nothing can be made of organisation in Coke upon Littleton, but the distinction is here made explicit, citing Bracton; cf also f 283: "evidence" does not only cover writings but also, in a wider sense, testimony); Rolle (written c.1638-40, though not published till 1668) has sub-sub-titles *Evidence* (writings) and *Testimonies* under the title Trial, sub-title *Trial per Pais*; William Shepherd's *Epitome* (1656) has subtitles *Evidence* and *Witnesses* under title Trial, as does his *Abridgement* (1675); Hughes' *Abridgement* (1660-3) and that of William Nelson (1725) and Comyns' *Digest* (written before 1741, when Comyns died, but not published until 1762-7) have separate titles *Evidence* and *Witnesses.* The first single title *Evidence* covering both witnesses and documents is in the *New Abridgement* (Vol 2, 1736) usually attributed to Matthew Bacon but thought to be based on some MS by Gilbert; by this time Nelson's *The Law of Evidence* (1717), covering both topics, though in separate chapters, was in its second edition.

I. Equity proof and the origins of the common law of evidence

Given the absence of evidence rules from modern civil law systems, an obvious explanation of their existence at common law is that the law of evidence is necessary because of the existence of the jury, which is apt to be misled by certain types of evidence, unlike a judge sitting alone. This was the explanation favoured by the older historians of the law of evidence, J.B. Thayer and J.H. Wigmore: the law of evidence arose, they argued, to allow the judiciary to control the eccentricities of the lay judges of fact[4].

This hypothesis had two historical implications which could provide an empirical test of it. The first is that the law of evidence would have had a more or less prolonged "pre-legal" period of gestation in which a regular course of practice was built up by individual discretionary rulings by judges, beginning in the late mediæval period as juries ceased to be composed of witnesses or self-informing, and becoming gradually visible in the scattered trial reports of the early modern period; Wigmore found these especially in the *State Trials*, the pamphlet reports of sensational political and criminal trials which began to be published in collected form in the 1690s. This body of discretionary rulings then flowered fully into a *law* of evidence with the development of regular *nisi prius* reporting in the late eighteenth century. The second was that the rules of evidence would "belong to" jury trial, and only be imported into the equity jurisdiction, where the judges sat alone, by a process of equity (inappropriately) following the law[5].

More recently the traditional account has been challenged in two ways, both of which deploy history and the relations of the common and civil law traditions to criticise the theory of evidence law as a necessary jury control mechanism.

The first line of objection is that while modern civil law systems generally follow a régime of "free proof", this was not true of the early modern period when the law of evidence appeared at common law. Rather, there was an elaborate body of proof law, the roman-canon law of proof or system of legal proofs, in use in the church courts and in most of continental europe from the later middle ages until it was swept away by the French Revolution. The law of proof required the (professional) judge of facts to decide on the basis of an objectively fixed quantum of proof - two concurring independent witnesses of good character, or an equivalent combination of proofs. Around this principle was built up a highly elaborate body of law concerning confessions, the competence and credibility of witnesses, their compulsion and its limits and their examination, the different types of admissible

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[4] J. B. Thayer. *A Preliminary treatise on evidence at the common law* (Boston, 1898; reprint, 1969) Introduction 1-2, and *passim;* J. H. Wigmore, *Treatise on Evidence at Common Law* (3rd edn, Boston, 1940) § 8 and *passim.*

[5] On the first point, Thayer 1-2, Wigmore § 8; on the second, Wigmore §§ 4 (general), 575 (competence of witnesses), 2250, 2256 (self-incrimination), 2426 (parol evidence rule), 3426 (Statute of Frauds).