The law of proof in early modern Equity

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Michael R.T. Macnair, The Law of Proof in Early Modern Equity, Comparative Studies in Continental and Anglo-American Legal History, Band 20, Duncker & Humblot, Berlin 1999, 322 p., ISBN 3-428-09198-1

For a long time it seemed that the history of the law of procedure was mainly the domain of German and Italian scholars. Currently, this situation is changing. Within the last decade or so, various important studies in this field have been published by legal historians from other countries. Among the more recent are a study by W. Litewski on the roman-canon law of civil procedure of the oldest *ordines iudiciarii* (on which a review will be published in a forthcoming issue of the Legal History Review), as well as the study by Dr. Michael Macnair, which is the subject of the present review. (It should be noted that I use civilian categories when classifying Dr. Macnair's study as being procedural in nature, since evidence is categorised as a separate branch of the law in common law jurisdictions).

The Law of Proof in Early Modern Equity is important not only from the perspective of legal history, but also from the perspective of the present debate in the European Union and outside as regards the approximation of civil procedure. Within the European Union first steps towards approximation were taken by the Working Group chaired by Professor Marcel Storme from Ghent. This Working Group published a report entitled *Approximation of Judiciary Law in the European Union*. Approximation on an even larger scale is envisaged by the *Principles and Rules of Transnational Civil Procedure*, which are currently being developed by UNIDROIT. Dr. Macnair's book is very valuable with respect to both initiatives, not the least because it discusses early modern mechanisms of convergence between the laws of procedure of common law and civil law jurisdictions.

In his study, the author investigates the traditional position that strict rules on the admissability of proof of facts in modern common law jurisdictions originate in trial by jury. This position has been advocated by the older historians of law and, indeed, seems plausible due to the absence of such strict rules in modern civil law jurisdictions. The absence of strict rules on proof in the latter jurisdictions is usually explained by the absence of lay triers of fact making up the jury as in common law jurisdictions. The author also addresses the relationship between common law and civil law in early modern England and the role in this relationship of the equity courts. The question is posed whether the traditional view that equity was the vehicle for the reception of civil law ideas within the common law is correct.

In discussing these themes, the book follows contemporary discussions of proof and evidence by both civilians and common lawyers: the instruments of proof are used as its organising principle. Consequently, it deals with confessions (Chapter 2), documents (Chapters 3-4), witnesses (Chapters 5-8) and burden and standard of proof and presumptions (Chapter 9). The source material is mainly printed reports of cases with the occasional use of manuscript materials. The period covered starts around 1550. Before this date there were no legal rules governing the evidence presented to a jury. It ends in the first half of the eighteenth century, when there was definitely 'a law of evidence' at common law. It should, however, be remembered that the rules making up this 'law of evidence' do not necessarily coincide with the modern rules since there was a mutation in the character of jury trial in the later eighteenth century.

Although trial by jury has long been advocated as the origin of the strict rules regarding the proof of facts in common law jurisdictions, whereas equity was merely viewed as having adopted these rules (it should be remembered that trial by jury was not a feature of courts of equity), modern authors have criticised the traditional view. Some have stated that the common law of evidence can better be explained 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. Others have held that a sufficient explanation may be found in the dynamics of the common law trial of the late eighteenth century. According to Dr. Macnair, the missing part in the traditional and modern explanations is the role of the English courts of equity and their doctrine and procedure in relation to proof.

In his introductory Chapter, the author claims that the absence of strict rules of proof in civil law jurisdictions does not necessarily lead to the conclusion that the origin of these rules can be found in trial by jury. It is indeed a known fact that the procedures on the continent, based on the romano-canonical procedure, originally contained a great number of strict rules on proof even though trial by jury was absent. This romano-canonical system of 'legal proofs' required the professional judge of facts to decide the case on an objectively fixed quantum of proof. The system assigned to each type of proof a particular weight and it was the task of the judge to determine whether the weight of the proof that had been administered added up to full proof. Full proof could, for example, be administered by two independent concurring witnesses of good character, the weight of a single witness consequently being 0,5. At the time the law of evidence appeared at common law, the system of 'legal proof' was widely observed within the civil law jurisdictions. This system only disappeared at the end of the eighteenth century.

Having thus established that it is likely that other factors have contributed to the creation of the law of evidence at common law, Dr. Macnair starts his search for these factors. Since the author claims that the origins of the law of proof antedate the mid-eighteenth century, he can leave aside the opinion of those authors who situate its origin in the dynamics of proof concepts of the late eighteenth century (even though it must be acknowledged that many of the *modern* rules of proof do originate in this period). The author does, however, have to address the opinion of other scholars, who state that the true origin of the rules of proof may be be found in the intellectual culture of early modern England and Europe and the place of proof concepts of the contemporary civil and canon laws within it. Dr. Macnair agrees with this point of view. He explains that in the early modern period the common law should be viewed as local positive law, within the general hierarchy of laws accepted in later medieval and early modern thought (the hierarchy being divine law, natural law, the law of nations and positive law). Within this framework, he claims, the basic ideas of the law of proof were considered to be of divine law, since they could be supported from the Bible. As such they were binding on all tribunals whatever. Divine law as a source was later replaced by more general natural law concepts drawn from the universal usages of nations. A substantial part of these concepts was to be found in the civilian and theological literature. They did directly influence the common law of proof. Partly this may have been due to the fact that courts of equity aimed at offering relief against the defects of the common law. Some of these defects were to be found in the existing rules of proof at common law (for example those concerning common law estoppels and the absence of compulsion of witnesses). By reforming their proof rules, common lawyers could prevent the intervention of equity courts and consequently increase their business. The reforms included the introduction of a 'natural law' version of proof concepts. A 'natural law' version of proof concepts lay ready at hand in civilian and

theological sources and was acceptable to common lawyers due to the above mentioned hierarchy of laws in the early modern period.

Having explained that equity may have furnished an important pressure driving the development of rules of evidence to a jury at common law, Dr. Macnair addresses the sources of the 'natural law' version of proof used by the common lawyers. It has been suggested that the common lawyers did not directly consult civilian and theological literature, but copied 'civilian' concepts of proof from equity. Equity may indeed have been the origin of these concepts at common law since, according to Dr. Macnair, there are at least three reasons to suppose that equity proof was a system which applied the general principles of the roman-canon law of proof (although the author also claims that the rules of proof in equity were certainly not equivalent to those of the roman-canon law). 'The first is parallelism of content; the second linguistic echoes; and the third instances of direct citation.' (p. 289) There are various instances in which rules indeed may have been copied by common lawyers from equity (for example rules concerning 'discovery' and subpoenas ad testificandum). However, in other areas the sources for equity proof doctrine largely begin at the same period as the first steps in common law evidence doctrine (e.g. documentary originals, exceptions to witnesses) and, consequently, equity cannot have been a source. According to Dr. Macnair, in the latter areas there is direct or near-direct evidence of common lawyers referring directly to civilian sources on proof matters. Apparently, the common lawyers 'were perfectly capable of citing civilian or theological sources for themselves ...' (p. 38).

Apart from the role of equity and the civil law in the formation of rules of proof at common law, the author discusses the manner in which the common law of proof may have influenced equity. A vehicle may have been the mechanism of the 'feigned issue'. By way of this mechanism issues of fact arising before the courts of equity could be sent to be tried by jury. Its existence shows that 'the relation between equity proof and common law trial over the period [discussed in the present study, CHvR] is […] not a straightforward one either of equity following rules developed at law to control the jury, or of complete independence, or of the common law simply following existing developments in equity' (p. 287).

In his concluding Chapter, the author asks the question whether common law systems vary from civil law systems in having a system of rules of evidence arising from the historical role of trial by jury. According to him, the answer is both yes and no. The author states: 'It is 'yes' because it is reasonably clear that the introduction of rules of evidence subjected the jury to a judicial control which had been absent in the later fourteenth, fifteenth and early sixteenth centuries; and if [...] this change was partly driven by the pressure of equity intervention, that pressure in turn was in part a response to the perceived problems of jury trial in the late middle ages. It is 'no', however, at a more fundamental level. This is that *judicial* factfinding in equity (and, indeed, at common law) was thought to be subject to rules governing the nature and *quantum* of proof *before* rules of evidence were applied to jury trial; and, indeed, many of the rules of evidence applied at law by 1700 appeared in equity sources before they appeared at common law. Moreover, the idea that judicial fact-finding was subject to proof rules, and many of the specific rules which came to be used, were shared with or drawn from the civil law tradition. The creation of the law governing evidence to a jury was therefore in its own time a *convergence* (albeit not a complete one) between the common and the civil laws. The explanation of the difference which exists today is to be sought only partly in this period; partly, and perhaps more significantly, it should be sought later in the history of the two traditions, in the period of the abolition of the old law of proof in continental europe.'

To conclude this review I would like to emphasise that Dr. Macnair has written a book which is important for both historians of law and those involved in current attempts to harmonise the law of civil procedure. The book forms an intelligent and historically accurate analysis of early modern source material which sets the example for future studies in this field. In my opinion, it should be part of the library of anyone interested in the relationship between common law and civil law.

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