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## Burden of Proof and Cause of Action

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Burden of proof must be understood in terms of burdens not proof. It is one in a series of burdens the law assigns and every burden assigned to one side is a benefit conferred on the other. Burden of proof is substantive rather than procedural. Who must prove and what must be proven cannot be separated. The distinction between burden of proof and cause of action makes us misunderstand the law.

Il faut insister sur l'aspect onéreux du fardeau de la preuve plutôt que sur sa force probante. Plusieurs fardeaux doivent être répartis lors d'une poursuite judiciaire et l'imposition d'un fardeau sur une des parties en litige confère un avantage net à l'autre. Le concept du fardeau de la preuve fait davantage partie des règles de droit substantif que des règles de procédure. La personne sur laquelle repose le fardeau de la preuve et le fait à prouver sont indissociables. La distinction que l'on trace parfois entre le fardeau de la preuve et la cause d'action n'est pas justifiée et sème la confusion.

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Burden of proof is a very simple concept. It is a matter of common sense. If you are driving your car and you come to an intersection at which a traffic light is showing both red and green, you may not assume that the green light is correct and proceed through. You must obey the red light and come to a stop. When you are able to assure yourself that it would be safe to proceed, you may then take advantage of the green light and go. The green light has the burden of proof. The red light has the benefit of the doubt. These two terms, burden of proof and benefit of the doubt, work together and since burden of proof only arises when there is a contest of some sort, the first and most important thing to notice is that burden is the central notion, not proof. Every burden allocated to one side is a benefit conferred on the other.

Legal theory has beclouded burden of proof by putting the stress on proof. Actually, burden of proof has very little to do with proof. It is a technique for making decisions in the *absence* of proof, a technique for

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drawing conclusions from inconclusive evidence. This is the reason why the notion of a burden never arises in logic, mathematics, or science, three areas in which proof is at least as important as it is in law. Mathematical and logical proofs are abstract; they do not depend on evidence at all, and though scientific proofs do depend on evidence, a scientist is never called upon to come to a conclusion unless the evidence is conclusive.

Only in law do we have an articulated, well-developed notion of burden of proof and that is because judges (and jurors with the help of judges) are regularly called upon to come to conclusions in the absence of conclusive proof. Consider the phrase: "conclusive proof"; anywhere else but in law, it is a tautology. It is only in law that "inconclusive proof" can count as proof; indeed, inconclusive proof is characteristic of law. If either side to a legal dispute could really *prove* its case, the case would never go to trial.

The burden of proof allows us to make a decision where we are not sure which decision to make. It serves the same function that flipping a coin does, except for one thing: the burden of proof is always weighted on one side or another.

The second thing to notice about the burden of proof is that it is only one in a series of legal burdens, and while it is the best known of the legal burdens, it is not the most important. Every legal procedure, and that includes every form and application, imposes a legal burden, a hurdle in the way of achieving certain legal results.<sup>1</sup> Far and away the most important burden is that of initiating the proceedings in which proof will count. This is the burden of suing, filing, applying, petitioning, charging or claiming and, in general, all other burdens follow it. That is what we mean when we say that the law is conservative: it places hurdles in the way of whoever asks it to effect a change in the *status quo*.

The person who has the burden of initiating the proceedings will usually have the burden of pleading, that is, of stating a legally sound claim or cause of action, and the person who has the burden of pleading, will usually have the burden of proving as well. There are exceptions to both rules, especially the latter. Criminal law provides the most obvious examples of legal proceedings in which the burden of proving does not follow the burden of pleading; for instance, it is the defendant who must plead provocation, but

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<sup>1</sup>There is a sense in which legal procedures can be seen as facilitating or even permitting certain legal rights to be vindicated. This is because the burden of being outside the law is greater than any of the burdens inside it. "Before the law stands a doorkeeper. To this doorkeeper there comes a man from the country and prays for admittance to the law." Franz Kafka, *The Trial* (New York: Alfred A. Knopf, 1982) 267.

the prosecution which must prove the lack of it.<sup>2</sup> Tax audits and loyalty checks are examples of proceedings in which the burden of pleading does not follow the burden of initiating. From these examples it is easy to see why this particular break in the usual chain of burdens occurs so infrequently. Finally, of course, there is the burden of enforcement; this burden can only fall on the initiator since he is the one who is asking the law to effect a change.

It is important to see burden of proof in this context as one in a series of burdens and to note that, like the burden of proof, all legal burdens favour one side over another. You always want your opponent to have to do the applying or petitioning; then the law is on your side to start with.

The third thing to understand about the burden of proof, and in a way it is the most difficult to grasp because it is the most opposed to traditional theory, is that the burden of proof is a matter of substance, not procedure. Legal burdens make certain changes in the *status quo* less likely and others more likely. They do not absolutely determine what will happen. If they did, criminals would rarely be convicted, since nearly all of the burdens in a criminal case are on the prosecution. What the procedural structure of criminal law does is make it less likely that a criminal will be convicted; this is an expression of the substantive policy which is often summed up in the phrase: "better set ten guilty men free, than punish an innocent one."

Every legal burden, which means every legal procedure, manifests a substantive policy decision, a choice to weight the coin on one side or another. Stressing the proof part of burden of proof, with its connotations of truth and logic, makes it possible to deny the policy implication of legal burdens. The only coherent explanations that legal theory gives for burdens of proof are that they are either self-evident truths (as the phrase *res ipsa loquitur* implies) or logical necessities (as is implied by *qui affirmat*). But what speaks for itself and who is put in the position of affirming are always a matter of choice.

The real problem lies in the distinction between substance and procedure. That there is a close connection between the two has long been understood. As A.W.B. Simpson has remarked:

[I]t is never quite clear whether the rules of law were sanctioned by an appropriate procedure, or whether the rules were developed to explain the existing procedure; the truth no doubt in many cases was that law and procedure grew together.<sup>3</sup>

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<sup>2</sup>*Woolmington v. Director of Public Prosecutions* [1935] A.C. 462, [1935] All E.R. Rep. 1, and see generally P. Jones & R. Card, eds, *Cross and Jones' Introduction to Criminal Law*, 9<sup>th</sup> ed. (1976) 48-52.

<sup>3</sup>A.W.B. Simpson, *An Introduction to the History of Land Law* (1961) 43.

And the statement by Sir Henry Maine on the subject is quoted so often that it has almost become trite:

[S]ubstantive law has at first the look of being gradually secreted in the interstices of procedure. . . .<sup>4</sup>

Now both of these quotations minimize the distinction between substance and procedure, but they both allow that the distinction exists, and in one sense it does. Salmond described this sense best:

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.<sup>5</sup>

The distinction Salmond draws is a real one, but it has nothing to do with legal theory. As Salmond uses the terms, the substance of the law is that I own my shirt, that I must pay my bill in a restaurant or that I may discipline my son. In this sense, the substance of the law is a social fact, not a legal one. The distinction between substance and procedure makes sense so long as you are talking only about the way in which people conduct their ordinary affairs. As soon as lawyers get involved in the law, the distinction between substance and procedure vanishes. When lawyers draft contracts, draw up wills, register deeds or give tax advice, they are acting, to use Salmond's phrase, "in the outside world". They always have one eye, however, on what will happen should their work wind up "in the courts of justice". For a lawyer, substantive legal questions all come down to this: "if this matter becomes the subject of a dispute, will my clients have the benefits or the burdens?" His job is to make sure that his clients have the benefits, rather than the burdens, and in this sense he makes no distinction between substance and procedure. From a legal as opposed to a social point of view, the substance of law is equivalent to its procedure. The substance exists in procedure and nowhere else.

This was better understood when the writs were still in use. Take, for example, the creation of what we now call future interests. These were first recognized by the statute *De Donis Conditionalibus* in 1285.<sup>6</sup> To put it in the simplest terms, this statute provided that when a gift was given upon certain conditions, what we now call a fee tail, the courts were obliged to

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<sup>4</sup>Sir Henry Sumner Maine, *Dissertations on Early Law and Custom* (1883) 389.

<sup>5</sup>J. Salmond, *Jurisprudence* (1902) 577, as quoted in Risinger, "Substance" and "Procedure" *Revisited* (1982) 30 UCLA L.R. 189, 197.

<sup>6</sup>*The Statute of Westminster the Second*, 13 Edward I, c. 1 as reproduced in T. Tomlins, ed, *The Statutes at Large* (1811), vol. 1, 83 *et seq.*

give effect to those conditions. And as the statute unashamedly admits, there was only one way to give effect to legal rights in the Middle Ages — a new writ had to be created:

And forasmuch as in a new Case new Remedy must be provided, this Manner of Writ shall be granted to the Party that will purchase it.<sup>7</sup>

In order to give effect to the rights of reversioners and remaindermen, *De Donis* created the writ of *formedon*. In that writ one could allege:

- (1) that the manor in question was given to a certain man and his wife and their begotten heirs, or
- (2) that it was given to a certain man and the heirs of his body begotten, to descend after his death as it ought according to the form of gift, or
- (3) that it was given to a man and his wife in “frankmarriage” and, at their deaths, to their named son to descend thereafter according to the form of gift (*formam donationis*).<sup>8</sup>

The particularity of these allegations is important because, unlike the modern “writ”, the medieval writ was more than just a summons. Each writ was a pre-packaged case which included a *very* specific set of allegations. At trial, the case that was presented had to follow the allegations in the writ and could not differ from them in even the slightest detail. If the plaintiff did not prove *exactly* what was alleged in his writ, the writ would “abate” and the case would be dismissed.<sup>9</sup> As Bereford J. said in *Bardolf v. The Prioress of B.*:

[A] man must count according to the facts of his case and suit his count to his right.<sup>10</sup>

Notice that “right” is used here to mean the same thing as “writ.” That is what we mean when we say that, in medieval law, the writ “embodied” the right. But notice, too, that the writ embodied the right by setting out the burden of proof which had to be met in asserting it. This burden of proof was contained in the pre-packaged allegations which defined the cause of action.

<sup>7</sup>*The Statute of Westminster the Second, De Donis Conditionalibus*, (1285) 13 Edward I, c. 1, s. III., *ibid.*, 85.

<sup>8</sup>*The Statute of Westminster the Second, De Donis Conditionalibus*, (1285) 13 Edward I, c. 1, s. III, *ibid.*, as translated by the authors.

<sup>9</sup>See, for example, (1302) 30 Edward I Cornish Eyre, in A. Horwood, ed., *Year Books of the Reign of Edward I* (1863) 182, where the plaintiff was non-suited for bringing a writ of *formedon* which did not match the actual form of the gift, even though he claimed that there was no merit in the Registry to describe his conveyance.

<sup>10</sup>Year Book (1308-9) 2 Edward II, as translated by F.W. Maitland in *Yearbooks of Edward II*, vol. 1, Seldon Society (1903) vol. 17, 118, pl. 57.

Legal theory calls these pre-packaged allegations the “cause of action” rather than the “burden of proof”. *Who* must prove is said to be procedural; *what* must be proven is said to be substantive. The distinction is not helpful. Who must prove and what must be proven are too closely linked to be separated. The attempt to keep them separate serves no function except to disguise the policy nature of choices about the allocation of burdens. It also creates intellectual tangles. We will come to the tangles later, but before we do, it is necessary to demonstrate two things. First, that one could say everything one wished to say about a cause of action in terms of the burden of proof. Second, that talking in terms of burden of proof would enable one to say some additional things about a cause of action, some things that would be missed if the two concepts were kept separate.

This demonstration could be made in terms of any cause of action; let us take nuisance as an example.<sup>11</sup> This action arose out of *novel disseisin*. Under *novel disseisin* the question for the assise was whether the defendant had *iniuste et sine iudicio* (“unjustly and without judgment”) disseised the plaintiff of his freehold. The question in nuisance was whether, “unjustly and without judgment”, the defendant had done anything to the “harm” of the plaintiff’s freehold.<sup>12</sup> (The word for “harm” in the Latin writ was *nocumentum*, with our word “nuisance” developing through the French from *nocumentum*.<sup>13</sup>)

Since nuisance came from the same writ as *novel disseisin*, the burden of proof in the two actions was the same. As in *novel disseisin*, the plaintiff had to show first a freehold and then the *nocumentum*, or harm. If he was able to show both, he succeeded and, in theory, the strictness of pleading and proof which applied to the writ of *novel disseisin* applied to the writ of nuisance as well. The assise had to declare that the case was *sicut breve dicit* (“just as the writ said”) or the plaintiff failed. Thus, one ancient plaintiff lost his action because, although the assise agreed that the defendant had blocked off the plaintiff’s right of way, he had not done it where the plaintiff had said he had.<sup>14</sup>

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<sup>11</sup>This analysis of nuisance follows Coquillette, *Mosses From an Old Manse: Another Look at Some Historic Property Cases About the Environment* (1979) 64 Cornell L.R. 761; Provine, *Balancing Pollution and Property Rights: A Comparison of the Development of English and American Nuisance Law* (1978) 7 Anglo-American L.R. 31; and Hecht, *From Seisin to Sit-in: Evolving Property Concepts* (1964) 44 B.U.L.R. 435.

<sup>12</sup>G. Woodbine & S. Thorne, *Bracton on the Laws and Customs of England* (1977), vol. 3, 192.

<sup>13</sup>J. Baker, *Manual of French Law* (1979) 148.

<sup>14</sup>D. Stenton, *Rolls of the Justices in Eyre: Being the Rolls of Pleas and Assizes For Yorkshire in 3 Henry III (1218-19)*, Seldon Society (1937), vol. 56, 173, pl. 404.

But the writ of nuisance presented a problem which the assise of *novel disseisin* did not, a problem that tended to erode the theoretical strictness of the writ system. Just as there is a moral element in the question of what constitutes "title", which is absent in the question of what constitutes "possession", so there is a moral element in the question of what constitutes "harm" that is absent in the question of what constitutes "title". Any interference with your neighbour's title is theft and there can never be any justification for it. The same cannot be said of the "*de facto*" theft of nuisance; some harmful interference with the property of your neighbours is inevitable and all harmful uses of land are not treated as if they dispossessed the neighbouring owners. Unlike title, nuisance is a balancing of interests rather than a determining of rights.

The long common law history of nuisance evidences an effort to draw the line between a harmful use the law will stop and a harmful use it will allow to continue. This history can be expressed, as the history of any substantive legal question can be expressed, in terms of the burden of proof. In 1611 *Aldred's Case*<sup>15</sup> set out the basic burden. The defendant had built what is delicately referred to as a "house for hogs" next to the plaintiff's "habitation of man". The harm to the latter was so obvious that the court found the action "well-maintainable" and let the trial judgment of damages stand:

[F]or in a house, four things are desired *habitatio hominis, delectation inhabitantis, necessitas luminis, et salubritas aeris*, and for nuisance done to three of them an action lies. . . .<sup>16</sup>

It was for a nuisance done to the *delectatio inhabitantis*, the delight of the inhabitants, that an action was said not to lie, because "the law does not give an action of such things of delight".<sup>17</sup>

Legal conclusions are always expressed in this way, as if they were matters of fact (the "law does not give an action"). There is a choice being made here however. The law could have given an action for the delight of the inhabitants, but chose not to. The choice can be expressed as a burden of proof. If the plaintiff proved that his house had become unlivable, he succeeded ("for that is the principal end of a house"<sup>18</sup>); if all he managed to prove was that his house had become less delightful, he failed.

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<sup>15</sup>77 E.R. 816 (K.B.). Note that *Aldred's Case* and the cases that follow arose under the writ of trespass on the case, which replaced the assise of nuisance in the 1600's.

<sup>16</sup>*Ibid.*, 817.

<sup>17</sup>*Ibid.*, 821.

<sup>18</sup>*Ibid.*, 817.

But an important *dictum* also came out of *Aldred's Case*, one which influenced the burden of proof far beyond the specifics of harm outlined above.

And this stands with the rule of law and reason, *sc. Prohibetur ne quis faciat in suo quod nocere possit alieno: et sic utere tuo ut alienum non laedas*.<sup>19</sup>

The Latin phrase means: "It is prohibited that anyone should do on his own [land] what can harm a stranger; and thus use [your land] so that you do not harm others." It is the clause after the colon, the *sic utere* clause as it came to be called, which, with some objection, has been quoted most often as the burden of proof in nuisance law. In 1629, *Jones v. Powell*<sup>20</sup> applied the *sic utere* maxim in a case where a coal-burning brewery had driven the plaintiff from his home with smoke and "unwholesome vapours".

[A]lthough sea-cole be a necessary fuel to be used, and that brew-houses are necessary, yet the rule in law is, *sic utere*. . . and chimneys, dye houses, and tan-fats are also necessary, but so to be used, that they be not prejudicial to their neighbors.<sup>21</sup>

*Jones v. Powell* established the rule that the plaintiff had only to prove the harm and the defendant's act, for the defendant would not be heard to say that the nuisance was "unavoidable" or necessary to the public good. *Baten's Case*,<sup>22</sup> decided at almost the same time as *Aldred's Case*, further reduced the burden of proof for plaintiffs by quoting the maxim *lex non requirit verificare quod apparet curia*. In other words:

the plaintiffs need not in this case assign any special nuisance, for here it appears to the Court that it is to the plaintiffs' nuisance; . . . for in this case the defendant has built a new house, which overhangs part of the plaintiffs' house. . . so that of necessity the rain which falls from the new house must fall upon the plaintiffs' house. . . . [A]nd that which appears to the Court need not be averred. . . .<sup>23</sup>

In 1701, in the case of *Jones v. Hammond*,<sup>24</sup> the defendant asked for a non-suit because the plaintiff's declaration had admitted that the defendant was possessed of the close on which the nuisance had arisen and for that reason "such a general declaration is only good against a wrong doer. . . ."<sup>25</sup> The defendant was arguing that if he acted on his own land, the plaintiff had to prove more than just the act and the damage; he had to show that the defendant was in some way a "wrongdoer", but Holt C.J. rejected this argument.

<sup>19</sup>*Ibid.*

<sup>20</sup>123 E.R. 1155 (C. P.).

<sup>21</sup>*Ibid.*, 1155-6.

<sup>22</sup>77 E.R. 810 (K.B.).

<sup>23</sup>*Ibid.*, 811.

<sup>24</sup>92 E.R. 2 (K.B.).

<sup>25</sup>*Ibid.*

A defendant made a similar objection before Holt C.J. three years later in *Tenant v. Goldwin*,<sup>26</sup> and he also lost. At issue was the duty to maintain a party wall, which was wholly on the defendant's property. The plaintiff sued in nuisance to have it repaired by court order, but the defendant said that the plaintiff "ought to shew a title" if he claimed a right to order repair.

The last day of the term Holt Chief Justice delivered the opinion of the Court, that the declaration was sufficient. . . . [T]he reason of this case is upon this account, that every one must so use his own, as not to do damage to another.<sup>27</sup>

We witness in this case the least onerous burden of proof for nuisance. The plaintiff did not have to prove entry of the nuisance onto his land nor even the harm itself (where it could be presumed for him by the court). As Horwitz says:

In the eighteenth century, the right to property had been the right to absolute dominion over land, and absolute dominion, it was assumed, conferred on an owner the power to prevent any use of his neighbour's land that conflicted with his own quiet enjoyment.<sup>28</sup>

The Industrial Revolution brought a change in the burden of proof for nuisance. Up until the middle of the 1700's the burden had been getting progressively less onerous. From then on through the 1800's the burden got more and more onerous, as the courts restricted the operation of *sic utere* even as they cited it. Economic development was considered essential, so the plaintiff had to bear a more onerous burden to stop it. One early example of this can be found in the 1752 case of *Fishmongers' Co. v. East India Co.*<sup>29</sup>, where a wall, built by the defendant, had darkened the window lights of the plaintiff. Lord Hardwicke C. stated:

[I]t is not sufficient to say that it will alter the plaintiffs' lights, for then no vacant piece of ground could be build on in the city. . . . Therefore, take nothing by the motion.<sup>30</sup>

The high-water mark of this wave came in *St. Helen's Smelting Co. v. Tipping* (1865).<sup>31</sup> The policy decision which lay behind the raising of the burden is set out nicely in Lord Wensleydale's short speech in the House of Lords judgment. The plaintiff, he said, "must not stand on extreme rights. . . . Business could not go on if that were so."<sup>32</sup>

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<sup>26</sup>92 E.R. 222 (K.B.).

<sup>27</sup>*Ibid.*, 224.

<sup>28</sup>Horwitz, *The Transformation in the Conception of Property in American Law, 1780-1860* (1973) 40 U. Chi. L.R. 248.

<sup>29</sup>21 E.R. 232 (Chancery).

<sup>30</sup>*Ibid.*

<sup>31</sup>11 E.R. 1483 (H.L.).

<sup>32</sup>*Ibid.*, 1487.

This abbreviated history of the action in nuisance is meant to show that collapsing the distinction between burden of proof and cause of action would not hurt our understanding of the substantive law. On the contrary, uniting "who must prove" with "what must be proven" brings out some interesting and otherwise hidden facts about the substantive law. For instance, it shows that two things remained constant through the whole long common law development of nuisance. First, though the action came to be seen as a private tort action, the plaintiff always had the burden of proving that the defendant had harmed his *property*. It was never enough to show that the factory smoke merely smelled terrible or made his children cough at school. Nuisance grew out of *novel disseisin* and it never shed the burden of proof associated with the real actions.

The second constant in the history of nuisance is even more basic. The burden of proof gets more and less onerous, but it never shifted. The basic burden of initiating legal action to stop a harmful use of private property remained on the person who was hurt. This reflects a very deep substantive point in our law. The privacy of property is always taken for granted; an owner of private property is almost never called upon to bear the burden of defending his claim to exclusive, private possession. A rich man is entitled to throw away food, even if the people around him are starving.

This represents a choice, of course, just as the laws of zoning and planning reflect a choice in a different if not exactly an opposite direction. Zoning and planning laws place the burden on the land owner, not on those he might hurt. In modern times, the nuisance defendant has been turned into a planning plaintiff. No longer can the owner just use his land as he wishes and put the burden on those who wish to challenge him. Now, certain uses of land are permitted, and the owner who wishes to use his land in other ways has to apply for permission to do so.

The legal position of the planning plaintiff is instructive. Take a statute such as the British Columbia *Agricultural Land Commission Act*<sup>33</sup> which creates by section 15(2) a "green belt":

No person shall use agricultural land for any purpose other than farm use, except as permitted by . . . an order of the commission. . . .

Suppose a land owner wishes to use his property in a new way, a way which might be a "farm use" within the meaning of the statute, but which is not certainly so. The *Act* provides that the commission may hear applications for other than farm use, so the owner may file an application. Or, on

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<sup>33</sup>R.S.B.C. 1979, c. 9.

the other hand, he may choose not to file an application, in which case section 34 of the *Act* governs:

Where the commission believes that a present or future activity or use of land in an agricultural land reserve may contravene this Act, . . . the commission

(a) may order the owner or occupant to refrain from the activity or use for a period not exceeding 60 days, and to make written or oral submissions to the commission as it requires . . .;

(b) may apply to the Supreme Court for an order restraining the owner or occupant from commencing or continuing the activity or use of land. . . .

Three different procedures are established under the *Act*: one in which the owner applies for permission to use his land in the way he wishes; a second in which he is required to make written or oral submissions after having been temporarily prohibited from using his land as he wishes; and a third in which the commission applies to the Supreme Court for an order permanently enjoining the owner from using his land as he wishes. There is a sense in which one might say that the same substantive question will arise in each of the proceedings; namely, is the anticipated use a "farm use" within the meaning of the statute. But is the burden of proof the same in all the proceedings? Probably not. If the land owner applies, the burden would probably be on him to show that the use he proposes is a "farm use". If the commission goes to court, the burden would probably be on it to show that the use was not a "farm use". Where the burden would lie in the middle case is unclear.

Whether the land owner is trying to show that the use *is* a "farm use" or the commission is trying to show that it is *not* a "farm use", the same statutory provision and the same precedents will be applicable. In this sense, the two questions are substantively equivalent. But this sense is purely formal. In reality, particularly in the overall reality of the long range of cases, the outcome will depend on who has the burden of proof and the outcome is the substance of the law.

Separating procedure from substance and putting burden of proof in the former category hides the fact that the allocation of the burden of proof, like the allocation of any legal burden, gives effect to a policy decision. This alone would be enough reason to avoid the distinction between burden of proof and cause of action, but there is another reason as well. You cannot think sensibly about "who must prove" without thinking about "what must be proven". Attempts to do so have generated intellectual tangles. Foremost among these is the problem of the shifting burden of proof.

No subject in the law is more confusing; indeed, the shifting burden is one of the few things that everyone in law feels compelled to say he does

not fully understand.<sup>34</sup> The one thing everyone does know is the distinction between the burden of producing evidence and the burden of persuasion. The difference between the two was first pointed out at the end of the last century by Professor Thayer of Harvard<sup>35</sup> and you cannot get through law school without learning it.

There is no doubt in anyone's mind that the burden of producing evidence can and does shift. The question is whether the burden of persuasion does. No one is sure, or rather, some people are sure it does and some people are sure it does not.<sup>36</sup> The debate is very lively, with both sides exhibiting intense commitment to their position. But if you stop thinking about burden of proof as covering solely *who* must prove, the whole problem vanishes.

It is criminal law which generates the strong ideological pressure for the saying the burden of proof never shifts. The prosecution in a criminal case is said to have the burden of proving every element of its case beyond a reasonable doubt. No phrase is better known than that last one. It is the "procedural" expression of the "substantive" notion "innocent until proven guilty". We take great and justifiable pride in that notion, and when we criticize other societies as "totalitarian", we mean that their governments do not put that burden of proof on themselves.

But the burden of proving criminal guilt is different from the burden of proving the presence or the absence of civil liability. Because we adhere to the ideology which says the criminal defendant can say nothing and still be acquitted, he is not called upon to explain his behaviour even when the prosecution has made out a good case against him. But once a civil plaintiff proves what he must prove to establish his cause of action, there is no reason in either good sense or conscience why the burden should not "shift" to the defendant. If he has what the law calls an affirmative defence, he can be required to raise it, to offer evidence on it or even to persuade the trier of the facts.

Notice that this shift can only occur at one point in a trial — where the defendant loses on his motion to dismiss. After that, it is his turn to put in evidence. He can seek to *disprove* some part of the plaintiff's case, or to prove something *outside* the plaintiff's case but whichever he chooses, the burden of producing evidence has shifted to him. If he tries to prove something outside the plaintiff's case, an affirmative defence such as truth

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<sup>34</sup>See, for example, Stark, *Burden of Proof — New Light on an Old Problem* (1930) 8 C.B.R. 608; Hanbury, *The Burden of Proof* (1949) 61 Jurid. Rev. 121.

<sup>35</sup>J. Thayer, *Preliminary Treatise on Evidence at the Common Law* (1898) 355.

<sup>36</sup>Dworkin, *Easy Cases, Bad Law, and Burden of Proof* (1972) 25 Van. L.R. 1151, 1153 is sure it does not, and Denning, *Presumptions and Burdens* (1945) L.Q.R. 379, 380 is sure it does.

in libel, he also has the burden of persuasion; if he tries to disprove some element of the plaintiff's proof, the burden of persuasion will nearly always remain with the plaintiff.

There is nothing particularly complicated about this. All the confusion about the shifting burden arises out of the refusal to include what must be proven in the burden of proof. That refusal hides the fact that the law can "shift" any affirmative defence over into the cause of action or make any element of the cause of action into an affirmative defence. This is what Professor Stone means when he says: the burden of proof never shifts; the issue to be proven does.<sup>37</sup> But why make this distinction? It does not lead to intellectual clarity; on the contrary, the distinction between burden of proof and cause of action makes us misunderstand the law.

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<sup>37</sup>*Burden of Proof and the Judicial Process* (1944) 60 L.Q.R. 262, 263-4.