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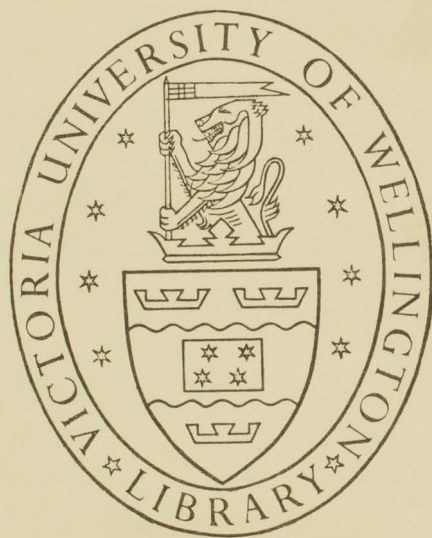
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INTRODUCTION

An accused person is presumed innocent until he is proved guilty.

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It is a cardinal rule that the general burden of proof in a criminal case is upon the prosecution. Throughout the web of the English criminal law, one golden thread is to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to the defence of insanity and subject also to any statutory exception. - Director of Public Prosecutions (1936) A.C. 413, at 421.

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CRIMINOLOGY - J.L.M. - 1973

RESEARCH PAPER

ON

CRIMINAL OATHS AND EXCULPATIONS: THE
PRESUMPTION OF INNOCENCE

LIM EE CHAT

Victoria University of Wellington,
Wellington,
New Zealand.

1973

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INTRODUCTION

An accused person is presumed innocent until he is proved guilty. The burden of proof of guilt beyond reasonable doubt is upon the prosecution. This is the cardinal rule of the criminal law in common law countries.

In practice, however, this principle has not been eroded by the courts but is increasingly and gradually

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CRIMINAL ONUS IN GENERAL

It is a cardinal rule that the general burden of proof in a criminal case is upon the prosecution. "Throughout the web of the English criminal law, one golden thread is to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject ... to the defence of insanity and subject also to any statutory exception". - Woolmington [1935] A.C. 462, at 481. That, of course was a case of murder, but Lord

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Sankey added: "No matter what the charge or where the trial, the principle that the prosecution must prove the accused proved guilty and that burden of proof of guilt beyond reasonable doubt is upon the prosecution. This is the cardinal rule of the criminal law in common law countries. In practice, however, this principle has not only been eroded by the courts but is increasingly and gradually dissected and removed from the criminal law by the legislature. The judicial and legislative inroads into this principle take the form of the reversal of the onus of proof against the accused person, an onus which this principle places on the prosecution. The policy consideration behind both the judicial and legislative "infringements" is one of expediency. This paper will consider the legal validity or otherwise of this judicial action, the extent of the inroads made by the legislature, the effect of these "infringements" on the presumption of innocence and the relevance of these term "the burden of proof". J.B. Thayer stressed the fact "infringements" and the presumption of innocence in actual practice in courts.

CRIMINAL ONUS IN GENERAL

It is a cardinal rule that the general burden of proof in a criminal case is upon the prosecution. "Throughout the web of the English criminal law, one golden thread is to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject ... to the defence of insanity and subject also to any statutory exception". - Woolmington [1935] A.C. 462, at 481. That, of course was a case of murder, but Lord

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Cross defined the first of the two senses mentioned

Sankey added: "No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained" - Ibid. 481.

Moreover, the quantum of proof required of the prosecution is a high one, for the tribunal must be satisfied beyond reasonable doubt that the accused is guilty. The word "tribunal" here means the triers of fact, that is to say, the jury if the trial is on indictment and the magistrates if it is a summary trial. In the words of Lord Atkin: "It is an essential principle of our criminal law that a criminal charge has to be established by the prosecution beyond reasonable doubt". - Lawrence [1933] A.C. 707

It is now necessary to consider what is meant by the term "the burden of proof". J.B. Thayer stressed the fact that the term is commonly used in two senses:

- (i) "The duty of going forward in argument or in producing evidence, whether at the beginning of a case, or any later moment throughout the trial or discussion."
- (ii) "The peculiar duty of him who has the risk of any given proposition on which parties are at issue - who will lose the case if he does not make this proposition out, when all has been said and done" - support a finding that the

A Preliminary Treatise on Evidence At Common Law, 355

Cross defined the first of the two senses mentioned

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by Thayer as "the burden of producing sufficient evidence to raise a particular issue - to require the Judge to leave that issue to the jury where there is one, or, if there is no jury, to require the Judge to consider the evidence when he comes to decide whether the legal burden has been discharged". - Evidence, 2nd N.Z. ed. 79. This is what Glanville Williams called the "evidential burden".

This should be distinguished from the obligation to satisfy the jury which Cross termed "persuasive burden" and which he described as "the burden borne by the party who will lose the issue unless he satisfies the tribunal of fact to the appropriate degree of conviction. It is aptly termed the "risk of non-persuasion" by Wigmore", - (supra). The persuasive burden refers to the standard or quantum of proof which may itself be different in different cases, for example, the prosecution must prove guilt beyond reasonable doubt; the plaintiff in a civil action must establish his case on the balance of probability.

The operation of and the distinction between these two principal burdens could best be seen by looking at the burden of proof that the prosecution has to discharge in establishing that a criminal act has been committed by an accused person in a trial by jury. It has two hurdles to overcome. First it must produce sufficient quantity of evidence to support a finding that the criminal act was committed by the accused so as to prevent the Judge from withdrawing the issue from the jury; and secondly it must persuade the jury beyond reasonable

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doubt by sufficient evidence as to the guilt of the accused. If it surmounts the first, it may yet fail at the second. This may be because the jury do not believe its witnesses, or will not draw the necessary inferences, or else because of the doubt raised by the evidence to the contrary. To quote Wigmore:

The common law rule is that an exonerating provision contained in the body of an enacting clause was an

"exco" The important practical distinction between these two senses of 'burden of proof' is this: But, the risk of non-persuasion operates when the case has come into the hands of the jury, while the duty of producing evidence implies a subsequent liability to a ruling by the Judge disposing of the issue without leaving the issue open to the jury's deliberations". - Evidence IX, Wigmore, p.284.

THE COMMON LAW RULE RELATING TO PROVISIOES AND EXCEPTIONS IN THE CRIMINAL LAW

In 2 Hale P.C. (1800 ed. written about the year 1650),

170- The problem with which this paper is mainly concerned arises in cases where the Legislature, either in the definition of an offence, or in some accompanying or incorporated or subsequent provision, negatives liability in certain circumstances, but makes no explicit provision as to the burden of pleading or proof. It may be for the prosecution to plead the negative averment, or for the defence to raise the issue under the plea of "not guilty"; and, quite apart from the comparatively unimportant question of pleading, there is the question whether it is for the prosecution to disprove the existence of the exonerating circumstances, or for the

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defence to prove their existence. If the burden of proof rests on the defence there is the further question whether, to use the modern terms, it is a persuasive or merely an evidential onus.

The common law rule is that an exonerating provision contained in the body of an enacting clause was an "exception"; and a pleader in alleging an offence, must include the negative averment in his pleading. But, if the exonerating provision were in a "proviso", the prosecution need not negative it in its pleading; and an exonerating provision contained in a subsequent statute was treated as a proviso.

One of the earliest statements of the law laying down the distinction between a "proviso" on the one hand and on the other "the circumstances which in the body of the Act make up the offence" is to be found in 2 Hale P.C. (1800 ed. written about the year 1650), 170-1:

"But where an offense is made felony, or otherwise punishable by act of parliament, tho the indictment must take in the circumstances, which in the body of the act make up the offense, yet if by a proviso in the same statute, or by any subsequent statute some cases or circumstances are exempted out of the act, the indictment need not mention and qualify the offense, so as to exempt it out of the proviso, but the party shall have advantage of the proviso by pleading not guilty"

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A similar statement was made by Treby C.J. in A CRITICAL ANALYSIS OF THE COMMON LAW RULE the civil case of Jones v. Axen (1696) 1 Ld. Raym.119:

"The difference is, that where an exception is incorporated in the body of the clause, he who pleads the clause ought also to plead the exception; but when there is a clause for the benefit of the pleader, and afterwards follows a proviso which is against him, he shall plead the clause, and leave it to the adversary to

(1) shew the proviso."

F. Adams interpreted the statements of Hale and Treby C.J. as not only expounding the common law rule relating to pleading but also to the onus of proof "which would be determined automatically by the meaning, as a proviso to that enactment. Thus, as J. Stone pointed out: "the proposition 'All animals have four legs except gorillas', and the proposition 'All animals as a dominant rule - the prima facie working rule to which are not gorillas have four legs', are so far as their meanings are concerned identical". - Burden of Proof paragraph 13; and "in the writer's opinion, it remains as a dominant rule - the prima facie working rule to which are not gorillas have four legs", are so far as their meanings are concerned identical". - Burden of Proof paragraph 14). and the Judicial Process (1944) 60 L.Q.R. 262, 260.

He then went on to conclude that where an exemption is expressed in the form of a proviso, it is, in general, logical problem is that of Bailhache J. in the civil case of Munro Price & Co v. War Risks Association [1918] 2 K.B. 78 relating to an action on a policy insuring formal words of reference in the enacting clause; and against loss by perils of the sea with a clause excepting that the converse proposition - that the onus is on the loss by capture, seizure and consequences of hostilities. prosecution in respect of everything contained in the enacting clause, may be regarded as a good prima facie rule: (supra, paragraph 26).

After reviewing the authorities, the learned Judge suggested that when a promise in the policy is qualified by exceptions (the word "exceptions" is used in a more generic sense as

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applying to and including provisos and the common law

A CRITICAL ANALYSIS OF THE COMMON LAW RULE

"exceptions"; the question whether the plaintiff need

prove It will be noted that Adams did not cite any not depend
authority in support of his interpretation that the separate
statements of Hale and Treby C.J. were propositions the
for the determination of the obligation to plead as qualified
well as of the evidential onus of proof. Nevertheless,
for the purpose of this analysis, it will be assumed that
that was the correct statement of the common law rule.

leaving some part of the general scope of the promise

(1) The question that immediately arises is what is
unqualified. According to Bailhache J., if the
the logical difference in meaning between an exception
exceptions were as wide in their scope as the general
within an enactment and a proviso to it? The answer
rule or proviso, they were to be regarded as common law
appears to be none at all. Every exception of an
exceptions, in which case the burden of proof was on the
enactment can equally be stated, without any change of
plaintiff. On the other hand, if the exceptions
meaning, as a proviso to that enactment. Thus, as J. Stone
merely excluded from the operation of the general rule a
pointed out: "the proposition 'All animals have four
promise particular classes of cases which would otherwise
legs except gorillas', and the proposition 'All animals
fall within it, they were to be treated as provisos and
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and the Judicial Process (1944) 60 L.Q.R. 262, 280. J.'s

supposed criterion cannot distinguish what is logically

One of the rare judicial attempts to face this
indistinguishable. Any exception to a class must qualify
logical problem is that of Bailhache J. in the civil case
the whole class, in the sense of being relevant to the whole
of Munro Brice & Co v. War Risks Association [1918]
class. However, if by as wide as the class he meant that
2 K.B.78 relating to an action on a policy insuring
the exception may coincide with the class, then there
against loss by perils of the sea with a clause excepting
can be no exception as wide as the class. Such an
loss by capture, seizure and consequences of hostilities.
"exception" would be merely a negation of the class. The
After reviewing the authorities, the learned Judge suggested
final paragraph of his analysis seems to remove the
that when a promise in the policy is qualified by exceptions
foundation of his distinction, for he concluded:

(the word "exceptions" is used in a more generic sense as

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applying to and including provisoes and the common law "exceptions") the question whether the plaintiff need prove facts which negative their application does not depend upon whether the exceptions are to be found in a separate clause or not. The question depended upon whether the exception was as wide as the promise, and thus qualified the whole of the promise, or whether it merely excluded from the operation of the promise particular classes of cases which but for the exception would fall within it, leaving some part of the general scope of the promise unqualified. According to Bailhache J., if the exceptions were as wide in their scope as the general rule or promise, they were to be regarded as common law exceptions, in which case the burden of proof was on the plaintiff. On the other hand, if the exceptions merely excluded from the operation of the general rule a promise particular classes of cases which would otherwise fall within it, they were to be treated as provisoes and the burden was upon the defendant.

It is submitted, with respect, that Bailhache J.'s supposed criterion cannot distinguish what is logically indistinguishable. Any exception to a class must qualify the whole class, in the sense of being relevant to the whole class. However, if by "as wide as" the class he meant that the exception may coincide with the class, then there can be no exception as wide as the class. Such an "exception" would be merely a negation of the class. The final paragraph of his analysis seems to remove the foundation of his distinction, for he concluded:

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is now entirely embodied in 'an authoritative form of words' and it would be ridiculous to imagine that the generally be turned by an alteration of phraseology Legislature is unaware of the legal rule. Without it we into a qualified promise. This form in which the should be like mariners at sea without a compass." contract is expressed is therefore material." (supra, paragraph 14). (supra, p.89).

As has been seen above, the common law rule does not On his own admission therefore the distinction may be and cannot rest on the basis of any logical foundation, of form merely, and not of meaning. It is the present In so far as the question of construction is concerned if submission that it is never otherwise. by "construction" it is meant that the consideration of the

The relative form or order of an exempting provision seems in fact to have been the only distinction between exceptions and provisoes. It boils down to this: does the exempting provision happen to be stated in the body of the enactment? or does it happen to be stated outside it? If it is the former then it is an exception; whereas, if it is the latter the exemption is a proviso. It might have been thought that such a mere point of draftmanship or parliamentary history, was the relative arrangement of the exempting provision, too slight an indication of legislative intention on Nor is it conceivable that the legislature would have the question of evidence. "As would be expected the couched its intention in "various guises" as Adams put the results of such a criterion, dependent as it often it. That the criminal law is entirely embodied in "an authoritative form of words" is without any doubt, assured a just or a convenient result." - J. Stone (supra, p. 281).

- (2) F. Adams suggested that the onus of proof as the
- determined by the distinction between exceptions and
- provisoes is "founded on a sound principle of construction,
- and has a sufficient logical foundation which has been
- generally accepted for centuries. Our own criminal law

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is now entirely embodied in 'an authoritative form of words' and it would be ridiculous to imagine that the Legislature is unaware of the legal rule. Without it we should be like mariners at sea without a compass." (supra, paragraph 14).

As has been seen above, the common law rule does not and cannot rest on the basis of any logical foundation. In so far as the question of construction is concerned if by "construction" it is meant that the consideration of the relative form or order of a particular enactment or exempting provision would lead to the discovery of the implied intention of the legislature as to the onus of proof, then, it is submitted that such a proposition could not be sustained for three reasons:-

Firstly, it is inconceivable, as already pointed out above, that the legislature would have left such an important matter as the onus of proof to be implied from the relative arrangement of the exempting provision. Nor is it conceivable that the legislature would have couched its intention in "various guises" as Adams put it. That the criminal law is entirely embodied in "an authoritative form of words" is without any doubt. However, to suggest that the legislative intention could be embodied in any form other than "an authoritative form of words" as Adams did suggest in his exposition of the common law rule, is plainly to ignore the fact that such an intention could only be conveyed in an authoritative form of words and not in the form of the relative arrangement of the enactment or in any other form whatsoever.

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Secondly, since the legal rule allocating the onus of proof based on the distinction between exceptions and provisos is of such great importance as without it "we should be like mariners at sea without a compass", surely, if the legislature intends to make any inroad into the "golden thread" of the English criminal law as enunciated in Woolmington's case (supra) - namely, that it is the duty of the prosecution to prove the prisoner's guilt - it would have expressed its intention in an authoritative form of words as, for instance, in Section 67(8) of the Summary Proceedings Act 1957. The failure of the legislature to make such provision is a clear indication that no such intention is ever contemplated by the legislature. In saying that without the common law rule "we should be like mariners at sea without a compass" Adams appeared not to have realised that in a criminal case a compass is always present in the form of "the golden thread".

Thirdly, there is no certainty in the rule in that a particular enactment is capable of two equally plausible and conflicting interpretations - namely, either as an exception or a proviso - and it had been differently interpreted by different courts. For example, in the case of Ewens [1967] 1 Q.B. 322, the statute ran as follows:

"Subject to any exemptions for which provision may be made by regulations ... and to the following provisions of this section, it shall not be lawful for a person to have in his

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possession" (any scheduled substance) "unless -

- (a) it is in his possession by virtue of a prescription; or (b); or (c)"

Adams regarded the provisions following the word "unless" as common law provisoes, particularly in view of the earlier words, "Subject ... to the following provisions". In the context of Ewens' case (supra), according to Adams, where the word "unless" is followed by a provision in the affirmative form, it is equivalent to "provided", followed by one in the negative, where it could readily be replaced, without any change of meaning, by a formula using the word "provided" and retaining the affirmative form (e.g., "provided that it shall be no offence if ..."). He did not give any reason why the word "provided" should be preferred in place of the plain and ordinary meaning of the word "unless" which is "except".

In point of fact in the case of Gill v. Scrivens and (1796) 101 E.R. 838 where the statute provided:

"The future estate and effects of such person shall be liable to his creditors, unless the estate shall produce sufficient to pay 15s in a pound....",

the exempting provision was held to be an exception. There is no reason why the word "unless" should not be substituted by the words "except where" without altering the meaning of the statute, as the court in the instant case appeared to have done. Adams, however, conceded that "this was probably the general rule at common law". (supra, paragraph 17).

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Nevertheless, in an endeavour to distinguish his approach to Ewens' case he suggested:

"But a different view may ... be permissible in some cases, particularly where, as in Ewens' case (supra), the 'unless' clause is a subsequent and complex one consisting of a series of self-contained paragraphs" (supra, paragraph 17).

Although the "unless" clause is in the subsequent part of the statute it is, nevertheless, within the statute itself. So was the "unless" clause in Gill v. Scrivens (supra). In respect of the question of the complexity of the "unless" clause itself one could hardly see its relevance in any form whatsoever to the interpretation of the legislative intention; although, it may be highly relevant as far as the convenience of its implementation is concerned. This latter factor is purely a policy consideration, which the court in this instance, is not and cannot be concerned with.

One wonders, with respect, that if the so-called "proviso" in Roche v. Willis [1934] All E.R. 613, 615, Lord Hewart C.J. said that where neither the word "proviso" nor the word "exception" occurs "precisely the same meaning can be conferred by the word "unless". Thus in all such cases, where the guilt or otherwise of an accused may depend on whether the onus of proof is on him or not, the issue between his freedom and punishment could be determined by the toss of a coin. Surely, the administration of justice, particularly, in the field of criminal law, requires far more certainty than this.

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Another illustration of the uncertainty of the common law rule is that what is in form a proviso might be so incorporated into the enacting clause by words of reference as to render it part of the enacting clause thereby making it into an exception thereto. In Steel v. Smith (1817) 1 B. & Ald. 94, 99-100 Abbott J. thought that "If any such words" (i.e. such as 'except as hereinafter provided') "had been introduced, it might fairly have been contended, that the subsequent proviso was once incorporated with the enacting clause; and then the objection might have been supported". Adams' comment on this proposition was:

"It is difficult to deny the theoretical possibility of such incorporation; but, as a century and a half have elapsed without any decision on the point, it is permissible to regard this as of little or no importance". (supra, para 24).

One wonders, with respect, that if the so-called "theoretical possibility" is of no importance when the liberty of the individual is at stake, what else is. Moreover, the court must stand between the individual and "any attempted encroachments on his liberty by the Executive; alert to see that any coercive action is justified in law". - Liversidge v. Anderson [1942] A.C. 206, 235 per Lord Atkin.

Thus where there is a want of clearness or definiteness of expression about the meaning of an enactment the court should give it that meaning which is in favour of

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the accused rather than against him: Walker v. Chapman
Ex parte Chapman (1904-05) St. R. Qd. 330. ss. 294 at p.304

(3) It is submitted that the common law rule is founded on the illusory assumption that in cases where exempting provisions are enacted there is also buried in those enactments a legislative intention in respect of the allocation of the burden of proof. There is, however, no justification to support such an assumption. Once the foundation of this assumption is demolished the common law rule built on the courts' purported reasoning based on the interpretation of the legislative intention must necessarily fail.

The source of the apparent uncertainty in the common law rule lies in the problem of ascertaining what the legislature contemplates in a situation for which it has not provided. Any conclusion arrived at on the basis of the common law rule results in the legislature being attributed with an intention, in an enactment other than that evinced in its words. To say that the legislature contemplates more than what it says is to make an assumption as to intention which in the nature of things the words employed cannot justify and which must lead inevitably to the conclusion that the words of the enactment do not mean what they say. To argue that the legislature, in cases where the exempting provisions are in the form of provisoes, has intended to impose an onus of proof on the accused which on the intention of the legislature evinced in its words it has not,

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respect of the onus of proof, readily ascertainable seems almost a contradiction in terms. Lord Halsbury by reference to absolute criteria and capable of application mechanically to particular cases is said:

"It appears to be arguing in a vicious circle to (4) begin by assuming an intention apart from the law language of the instrument itself and having made that fallacious assumption to bend the language in favour of the assumption so made."

Clearly, the courts in every application of the common law rule must, in the nature of the case make just such an assumption. The courts equally clearly cannot, in founding this assumption, be in fact concerned with the intention of the legislature in a situation for which it has not provided, that is, where an intention has either not been expressed or, more probably, not been formulated. If the courts, in determining whether, in a particular case, the onus is on the accused or the prosecution, cannot refer to what the legislature contemplates in this circumstance, it must follow that in making this decision, the courts in fact apply their own criteria for determining the allocation of the onus. This extra-statutory "ought" inherent in the concept of the common law rule and in the absence of a statutory definition of the expression must remain an entirely subjective concept. It is submitted that this examination of the common law rule suggests and indeed compels the conclusion that to treat exempting provisions as having an objective content in

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respect of the onus of proof, readily ascertainable by reference to absolute criteria and capable of application mechanistically to particular cases is conceptually mistaken.

(4) The only possible justification, then, for the common law rule is one of policy consideration. In R. v. James [1902] 1 K.B. 540 the Court of Criminal Appeal decided that where a person is exempt from a penalty under certain circumstances by a proviso in a statute and not in the body of it, the prosecution need not state that the accused is not within the exemptions, for that is merely matter of defence to be shown by the defendant; but that the onus would be on the prosecution if the exempting clause were in the form of an exception contained in the enacting clause. In the later case of R. v. Oliver [1944] 1 K.B. 68 the same court rejected this common law rule and held that the criterion for determining the allocation of the onus in such cases is not whether the exempting provision is an exception or a proviso to the enacting clause, but whether the exemption is a fact peculiarly within the knowledge of the accused.

In that case, the accused was charged as a wholesaler, with supplying sugar ... otherwise than under the terms of a licence ... contrary to regulation 55 of the Defence (Gen.) Regulations 1939, which provided that:

"Subject to any directions given or except under ... a licence, permit or other authority ... no ... wholesaler shall by way of trade ... supply ... any sugar."

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In deciding that the onus was on the accused to prove that he had a licence the court said:

"It would have been sufficient in our judgment, merely to charge the appellant with having supplied controlled goods contrary to the provisions of the order. The appellant's answer would then be in the nature of a confession and avoidance, assuming the fact to be that he had a licence to supply. We are not impressed with the argument based on the form of the order. With the greatest respect to the judgment of Lord Alverstone in R. v. James it seems to us to be very difficult to make the result depend on the question whether the negative is of a proviso or of an exception. We think it makes no difference at all that the order was drafted as it now appears instead of being in a form which absolutely prohibits the supply of sugar except as thereafter provided, with a later clause providing that if a person is supplied under a licence he should be excused ..." (Ibid. p.73).

The Court then went on to conclude by quoting and adopting a passage from the judgments of Bayley J. in R. v. Turner (1816) 105 E.R. 1026:

"Bayley J. said: 'I have always understood it to be a general rule, that if a negative averment be made by one party, which is peculiarly within the knowledge of the other, the party within whose

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knowledge it lies, and who asserts the affirmative, is to prove it, and not he who avers the negative" (Ibid. p.74).

... the proof of which is easy on the one side, but That this decision is based purely on policy consideration could best be seen in Turner's case (supra) where a charge was laid under the game law statute which prohibited the killing of game by all persons not possessing one of the complicated series of qualifications set out as part and parcel of the enacting clause; and this had long been regarded as a typical illustration of an exception under the common law rule. The charge was against a carrier for having in his possession game not sent up by a person qualified to kill game under the said statute; and, in a court presided over by Lord Ellenborough, it was unanimously held that the onus of proving the qualification of the person who had sent up the game lay on the accused. The relevant part of Lord Ellenborough's judgment went as follows:

"There are, I think, about ten different heads of qualification enumerated in the statute to which proof may be applied; and according to the argument of to-day, every person who lays an information of this sort is bound to give satisfactory evidence before the magistrates to negative the defendant's qualification upon each of those several heads. The argument really comes to this, that there would be a moral impossibility of even convicting upon such an information. And does not, then,

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common sense show, that the burden of proof ought to be cast on the person, who by establishing any one of the qualifications, will be well defended? ... the proof of which is easy on the one side, but almost impossible on the other". (supra, p.1028).

Bayley J. was of the same opinion:

"I am of the same opinion, I have always understood it to be a general rule, that if a negative averment be made by one party, which is peculiarly within the knowledge of the other, the party within whose knowledge it lies, and who asserts the affirmative is to prove it And if we consider the reason of the thing in this particular case, we cannot but see that it is next to impossible that the witness for the prosecution should be prepared to give any evidence of the defendant's want of qualification. On the other hand, there is no hardship in casting the burden of the affirmative proof on the defendant because he must be presumed to know his qualification and to be able to prove it". (supra, 1028).

In support of his decision, Lord Ellenborough cited two civil cases:

"But in Spieres v. Parker (1786) 99 E.R. 1019, I find Lord Mansfield laying down the rule, that in actions upon the game laws, (and I see no good

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by the reason why the rule should not be applied to
Walker information as well as actions) the plaintiff (2-3).
must negative the exceptions in the enacting
clause, though the throw of burden of proof on
the other side. The same was said in Telfs
v. Ballard 1 B. & P.468, by Heath J.; and such I
believe has been the prevailing opinion of the
profession and the practice" (supra 1028)
The decision of Turner's case (supra) cannot
be supported for the following reasons: Firstly, on the
basis of the common law rule it is contrary to the
intention of the legislature for, as mentioned in the
preceding discussion, where the exempting provision is
in the form of an exception - as was the case in the
present case - the legislative intention is to cast the
onus of proof on the prosecution and not the accused. It
is a general principle of the common law rule that an
exempting provision in the form of an exception
is one which is contained in the enacting clause and,
therefore, constitutes one of the essential ingredients
of the offence which the particular enactment creates.
The judgment of Turner's case (supra) amounts to this,
that the accused is to be deemed guilty in so far as his
want of qualification is concerned until he proves his
innocence. "This is reversing, with a vengeance, the
principle of our criminal law that a man is to be
deemed innocent until he is proved, by legal evidence,
to be guilty It lies on those who assert that the
Legislature has so enacted to make it out, convincingly

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by the language of the statute; ..." per Chubb J. in Walker v. Chapman, Ex parte Chapman (supra, pages 342-3).

There is, no doubt, no such legislative language in the relevant enactment in Turner's case (supra).

Secondly, in holding that the rule of civil procedure was equally applicable to criminal cases the court had ignored the fact that in criminal cases there are reasons of public policy for putting the onus of proof on the prosecution, whereas, no question of such policy is relevant in civil actions.

Thirdly, it is submitted that the function of the court is to administer the law as it is enacted by the legislature, and where, it is impossible "of even sense and convicting" accused persons if the natural construction of the statute is to be adopted, it is not the function of the court to step into the shoes of the legislature and remedy the defect of the law so as to render such conviction possible. It is further submitted that in any such defect in the law the court must maintain its impartial position - as it is required to do at all times - and rule in favour of the accused on the ground that the prosecution could not prove its case. To do otherwise, as the court in the instant case did, must necessarily mean that the court has assumed the role of an interested party - namely, the legislature. As Lord Atkin in Liversidge v. Anderson and Another (supra, p. 235-6) said:

"I view with apprehension the attitude of

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knowledge of the accused were placed on him it would be direct. Judges who, on a mere question of construction when face to face with claims involving the liberty of the subject show themselves more executive minded than the Executive. Their function is to give words their natural meaning, ... in a case where the liberty of the subject is concerned, we cannot go beyond the natural construction of the statute' It has always been one of the pillars of liberty ... that Judges are no respectors of persons and stand between the subject and any attempted encroachments on his liberty by the Executive; alert to see that any coercive action is justified in law".

Lastly, much emphasis has been placed on common sense and convenience when it comes to the question of administering the law as expressed by Lord Ellenborough and Bayley J. in Turner's case (supra) and in support of their views Adams commented:

"This decision has been much criticised, but there is much to be said in its favour on the grounds of common sense and convenience." (supra, paragraph 38).

Surely if common sense and convenience are sufficient reason for the courts to erode the accused's right to the presumption of his innocence, then for the same reason he should be required to prove his innocence, which, moreover, is a fact peculiarly within his knowledge. If the onus of proving all facts peculiarly within the

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knowledge of the accused were placed on him it would be directly contrary to the common law principle enunciated in Woolmington's case (supra) for there is nothing more obviously within the knowledge of the accused than his own state of mind, yet the burden of proving this rests on the prosecution. It is worth recalling here the remark which has become a judicial common place that at common law the only onus of proof cast upon the accused is in respect of the defence of insanity.

STANDARD OF PROOF IN STATUTORY EXCEPTIONS

As has been mentioned above, Woolmington's case (supra) recognised two exceptions to the otherwise universal rule that the onus is on the prosecution to prove the accused guilty beyond reasonable doubt. The exception as to insanity does not call for consideration here, and this paper shall concern itself only with what were therein described as "statutory exceptions". If the meaning of "statutory exceptions" be not sufficiently plain, reference may be made to Mancini [1942] A.C. 1, at 11, where, in restating the law Viscount Simon L.C. substituted the words "in offences where the onus of proof is specifically dealt with by statute".

The meaning is clear that, in order to give rise to a "statutory exception", the very point as to onus must be dealt with. In such cases there are what Professor Glanville Williams termed as "statutory reversals of onus". What is, however, not clear is the question of the standard of proof that may be sufficient to displace these statutory reversals of onus.

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This problem was first discussed and decided in R. v. Ward [1915] 3 K.B. 696 (C.C.A.). In that case the court had to consider section 58 of the English Larceny Act 1861 (now section 28 of the Act of 1916) whereby it was an offence for a person to be found by night in possession of an implement of housebreaking "without lawful excuse (the proof of which shall be upon such person)". The appellant was found by night in possession of such implements, but gave evidence that he was a bricklayer, that the implements were tools of his trade, and that he was on his way to work when apprehended. The jury were directed by the trial Judge that it was for the appellant to satisfy them that he was rightly in possession of the tools at the time and that he had no unlawful intention. In other words, the trial Judge ruled that the statutory reversal of onus placed on the appellant a persuasive burden. The Court of Criminal Appeal, however, held that "the appellant had established prima facie that he had a lawful excuse for being in possession of the tools, and the onus was shifted on to the prosecution to prove to the satisfaction of the jury, if they could, from the other circumstances of the case that the appellant was not in possession of the tools for an innocent purpose but for the purpose of housebreaking". Thus on the authority of Ward's case (supra) the accused has an evidential onus only where there is a statutory reversal of onus against him.

However, in a later case, R. v. Carr-Briant [1943]

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beyond reasonable doubt. Moreover" (Ward's
 1 K.B. 607 (C.C.A.) the same Court held that where some
 matter is presumed against an accused person "unless the
 principle of our law expressed in the well-known
 contrary is proved", the jury should be directed that the
 burden of proof on the accused is less than that
 required at the hands of the prosecution in proving the
 case beyond a reasonable doubt, and that this burden may
 be discharged by evidence satisfying the jury of the
 probability of that which the accused is called on to
 establish. On the authority of this case the accused
 is, therefore, placed with a heavier onus - a persuasive
 one, as opposed to the much lighter onus - an evidential
 onus - held in Ward's case.

In R. v. Carr-Briant all that it was necessary for
 the court to decide was that it was, at all events,
 wrong to require from the accused proof beyond a
 reasonable doubt. In so far as the sweeping proposition
 cited above decides more than this, it must be regarded
 as obiter. That the words of the statute might be
 construed as affecting only the evidential onus of
 the proof does not appear either to have been argued or to have
 occurred to the court. In fact the court had before it,
 and indeed cited with approval the judgment in Ward's
 case, where the court commented that the authority of
Ward's case:
 "is, in our opinion, inconsistent with" (the
 prosecution argument) "that the words throwing
 the onus of proof of certain matters on the
 accused involve placing the accused in the same
 position as the prosecution in a normal case so
 as to require him that he should prove his case

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beyond reasonable doubt. Moreover" (Ward's unequivocally discarded and the dictum of R. v. Carr-Briant upheld, where the court held: principle of our law expressed in the well-known passage in the speech of Viscount Sankey L.C. in Woolmington v. D.P.P.: 'No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained'" (supra, 610).

It is submitted that for the above reasons the dictum of R. v. Carr-Briant cannot be sustained.

In a much later case of R. v. Patterson [1962] 2 Q.B. 429 (C.C.A.) the accused was charged under section 28 of the Larceny Act 1916 in that he was found "having in his possession without lawful excuse (the proof of which shall be on such person)" with implements of housebreaking, namely, a screwdriver in his pocket and an open razor up his right sleeve. The accused, a floor-layer's labourer, gave evidence that he had the implements with him as he needed them to repair the exhaust pipe of the car he had been driving, because it kept coming loose. The Court of Criminal Appeal held that once possession of such an implement had been shown by the prosecution, the burden shifted to the defence to prove, on the balance of probabilities, that there was lawful excuse for possession of the implement at the time and place in question. Thus the evidential onus placed on the accused by Ward's case is now

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unequivocally discarded and the dictum of R. v. Carr-Briant upheld, where the court held:

"The court has come to the conclusion that R. v. Ward is not a case which should be followed in the future. It seems to this court that it is wrong to speak of an onus being on the defendant, and that then, if he proves in effect that the implements are dual-purpose implements and are in fact implements of his trade, that shifts the burden back to the prosecution. Indeed it appears from an article in [1961] Criminal Law Review 256, in the commentary on R. v. Harris that reference was made to R. v. Ward and a criticism made of it, inter alia, on this ground of the shifting of the onus. It is said at p.257: 'In R. v. Ward it was held by the Court of Criminal Appeal that, once the prisoner has introduced prima facie evidence of a lawful excuse, the onus is shifted back to the prosecution to prove to the satisfaction of the jury that the prisoner was not in possession of the tools for an innocent purpose but for the purpose of house-breaking. In effect, this means that there is no burden of proof at all on the prisoner, for, if he can only raise a reasonable doubt in the jury's minds, he is entitled to be acquitted.' The Court thinks that there is justification in the criticism and that R. v. Ward ought not to be followed."

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In so far as the decision of R. v. Patterson is based on the ground that an evidential onus placed on the accused in cases of statutory reversal of onus does not constitute "proof", it is submitted, the decision cannot be supported. In the first place, it is clear that apt words in a statute, defining an offence can impose upon the accused the fixed burden of proving some matter of excuse or exoneration. But unambiguous words are seldom found. Among the many different devices, to which draftsmen resort, it is commonly found that, as against an accused person, a certain matter is to be presumed "unless the contrary is proved". Now the word "prove" suffers from the same ambiguity as the phrase "burden of proof". It may mean "prove by introducing some evidence" or it may mean "prove to the satisfaction of the jury". Prima facie, it might be thought, the word when it appears in a criminal statute should be so construed as to uphold, rather than reverse the common law rule affirmed so emphatically by Woolmington's case.

Secondly, it is submitted, that whenever an accused is required by statute to prove some matter in his defence, in terms which stop short of expressly requiring that he shall satisfy the jury, the effect is merely to relieve the prosecution of the initial necessity of giving evidence on that issue but by no means to relieve him of the fixed burden - persuasive burden - of proof, when the accused, by evidence upon the issue, has removed the effect of the presumption. The

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effect of the rules of presumption is that they impute to certain facts or groups of fact a prima facie significance or operation. In the conduct, then, of an argument, or of evidence they throw upon him against whom they operate the duty of meeting this imputation. Should nothing further be adduced, they may settle the question in a certain way; and so he who would not have it settled thus, must show cause. This is the whole effect of such a presumption. From the nature of the case, in negating a given supposition and calling for proof of it, there is meant such an amount of evidence or reason as may render the view contended for rationally probable. But beyond that, a presumption says nothing. As J.B. Thayer said:

"When, therefore, we read that the contrary of any particular presumption must be proved beyond reasonable doubt, as is sometimes said, for example, of the 'presumption of innocence' and the presumption of legitimacy, it is to be recognised that we have something superadded to the rule of presumption, namely another rule as to the amount of evidence which is needed to overcome the presumption; or, in other words, to start the case of the party who is silenced by it. And so, wherever any specific result is attributed to a presumption other than that of fixing the duty of going forward with proof. This last, and this alone, appears to be characteristic and essential work of the presumption". - Evidence at page 336.

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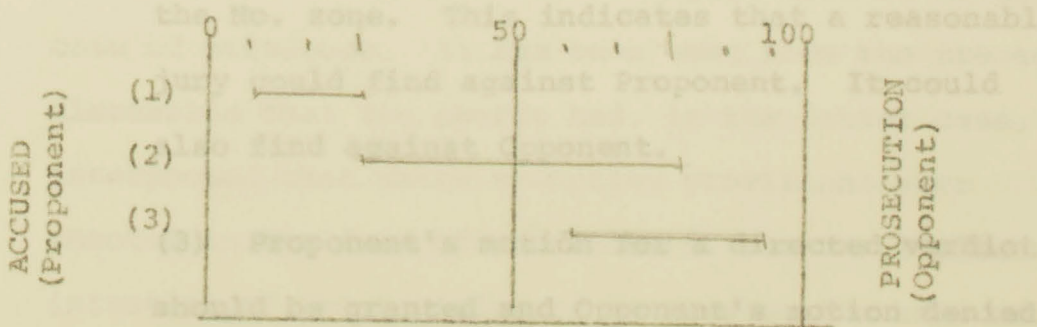
Thus where an enactment provides that a certain fact shall be presumed against an accused "unless the contrary is proved" without any qualification as to the quantum of such proof the onus placed on the accused is merely an evidential one. The essential character and operation of such a presumption, it is submitted, so far as the law of evidence is concerned, is in all cases the same, whether they be called by one name or the other; that is, to say, they throw upon the accused the duty of going forward with evidence; and this operation is all their effect. To quote Thayer again:

"What happens in such a case seems rather to be that the presumption has done the office, as regards a particular fact, of prima facie proof, so that the actor need not in the first place go forward as to the matter, his case for all purposes of beginning is proved by this without evidence, just as it would have been by evidence enough to make a prima facie case It is true, then, that presumptions 'shift the burden of proof' in the familiar sense of that phrase, importing the duty of going forward in the argument, or in the giving of evidence." (Ibid. p.380).

Thirdly, to hold that the evidential onus of proof is in effect not proof at all is to ignore the fact that for an accused to discharge the evidential onus he must produce evidence which would justify a reasonable jury

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in finding the existence or non-existence of a certain fact if a judicial ruling for the prosecution is to be avoided. This burden of production is, therefore, a function of the burden of persuasion of a reasonable jury. The evidential onus involved not just a determination of the probabilities of a fact by a reasonable jury. It involves also an estimate by the judge as to the limits within which such determination might fall. The judge, in whose mind the "reasonable jury" exists is a reasonable judge, and he has had the experience with many real juries; but what, he must ask, would a "reasonable jury" believe the probabilities to be? What is the maximum reasonable probability? What is the minimum reasonable probability? The judge's estimate therefore is not a single point - a single probability value. It is a range of probability values falling between two points. For the purposes of the evidential onus, questions of credibility are left to the jury and such questions must be resolved by the judge, when determining whether the evidential onus has been discharged, in favour of the accused. J.T. McNaughton illustrated this concept of persuasion of a reasonable jury from the point of view of the judge in the form of this diagram.



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if the state of the evidence is as indicated

The three ranges in the diagram above, according to McNaughton, have the following meanings, assuming that the applicable degree of persuasion, indicated by the line at the 50 per cent, is "by a preponderance of the evidence.": (1955) 68 Harv. L.R. 1362, 1367.

"(1) Opponent's motion for a directed verdict should be granted and Proponent's motion denied with the state of the evidence as described by range 1. The range is in the No zone. No reasonable jury, estimates the judge, would believe that existence of the fact is less than 10 per cent probable. Nor would any reasonable jury believe that existence of the fact is more than 25 per cent probable. These limits necessarily imply that no reasonable jury would believe that non-existence of the fact is more than 90 or less than 75 per cent probable. Persuasion is thus the basic ingredient of both the evidential case and the persuasive case.

(2) Neither party's motion for a directed verdict should be granted with the state of evidence as described by range 2. The estimated range of reasonable probabilities extends from 25 to 80 per cent. It lies partly in the Yes and partly in the No. zone. This indicates that a reasonable jury could find against Proponent. It could also find against Opponent.

(3) Proponent's motion for a directed verdict should be granted and Opponent's motion denied

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if the state of the evidence is as indicated by range 3. The 60 to 90 per cent range of probabilities is all in the Yes zone. No reasonable jury could find for Opponent."

Burden of Production of Evidence: A Function of Persuasion (1955) 68 Har. L.R. 1382, 1387.

In the context of the English Criminal law, the accused has not, in the estimate of the judge, discharged the evidential onus as represented by range 1 in the diagram. In that circumstance the judge will not leave the evidence in rebuttal of the presumed fact to the jury. However, in ranges 2 and 3, a reasonable jury could find for the accused and the judge would leave the issue to the jury.

From the above demonstration it is, therefore, apparent that the evidential onus involved the burden of production of evidence which in turn involves the function of persuasion. Persuasion is thus the basic ingredient of both the evidential onus and the persuasive onus.

Fourthly, there does not appear to be any valid distinction in respect of the standard of proof between an expressed statutory reversal of onus as in the case of statutory exceptions and an implied one as in the case of provisoes. It has been seen from the preceding discussion that the courts had, in the latter case, interpreted that where exempting provisions were enacted in the form of provisoes it was the implied intention of the legislature to reverse the onus of

In the case of Attyelle v. The King [1936] A.C.

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338 (P.C.) the Ceylon Legislature enacted that "when any proof on the accused as regards those provisos and act is especially within the knowledge of any person, that such onus was discharged by the accused on the basis of an evidential onus. As both expressed and implied statutory onus represent the same intention of the legislature in reversing the onus of proof it would, therefore, follow that the same standard of proof must apply in both cases. To suggest that an expressed statutory reversal of such onus imposes a heavier standard than an implied one is, therefore, logically and legally untenable.

Fifthly, there are decided cases to support the view that where a statutory reversal of onus is in respect of an essential ingredient of the offence the onus required of the accused is an evidential one. To require more of him is to penalise him even if he casts a reasonable doubt in the prosecution's case. If the accused is entitled to an acquittal because a reasonable doubt in the prosecution's case is cast on an essential element, in the context of the ordinary rules of the criminal law it means that if the prosecution's case is consistent with guilt, it is also consistent with innocence. Surely the same right should be afforded to the accused in cases, where a statutory reversal of onus applies, if he succeeds in establishing a prima facie case in rebuttal of the presumption against him. To require him to do more is to expect him to prove that his alleged innocence is more cogent and creditworthy than his alleged guilt.

In the case of Attygalle v. The King [1936] A.C.

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338 (P.C.) the Ceylon Legislature enacted that "when any act is especially within the knowledge of any person, the burden of proving that fact is on him".

The prosecution was against the first accused for performing an illegal operation and against the second accused for abetting him in that crime. The trial Judge interpreted the statute as meaning that the burden was on the accused to prove any fact peculiarly within his knowledge and said:

"Miss Maye" (that is the person upon whom the operation was alleged to have been performed)

"was unconscious and what took place in the room that three-quarters of an hour that she was under chloroform is a fact especially within the knowledge of these two accused who were there. The burden of proving that fact, the law says is upon them, namely, that no criminal operation took place, but what took place was this *speculam* examination."

The Privy Council, however, held that that was not the law. Lord Denning said that the onus referred to in the enactment is evidential only and that the enactment does not relieve the prosecution of the necessity of proving its case by oral evidence: Presumptions and Burdens (1945) 61 L.Q.R. 379 at 383.

Similarly, in the Australian case of Ex Parte Healey (1903) 3 St. R. (N.S.W.) 14 the court held that a statutory reversal of onus only cast on the accused an evidential onus. In that case the accused was charged with

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unlawfully having upon his premises an illicit still. Section 144 of the Excise Act provided that in every excise prosecution the averment of the prosecutor in the information shall be deemed to be proved in the absence of proof to the contrary. The court decided that the statutory reversal of onus enacted by section 144 is merely to obviate the difficulty of the prosecution of proving its case and to allow the information on even a mere declaration or claim to be prima facie proof of the offence, which but for the existence of the statute, would have to be proved by oral evidence; and, according to the court, it was never intended by the legislature that because the prosecution is relieved of the necessity of proving its case by oral evidence, the court should be bound to convict in every case where, the accused failing to prove his innocence to the court's satisfaction, the court is still unable to say that the accused is guilty. With reference to section 144 the court pointed out:

"It has been argued that the expression 'proof' in s.144 means proof to the satisfaction of the tribunal adjudicating, but to my mind, in order to make the section consistent with the ordinary rules which govern the court in criminal matters, the expression must be read 'in the absence of evidence to the contrary'. Of course if the accused gives no evidence, his guilt must be taken to be established; but if

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the party charged is to be deemed guilty the accused does give evidence, and the Magistrate, upon the whole of the evidence before him, has any doubt as to the guilt of the accused, it is his duty to give him the benefit of the doubt and acquit him". (supra, 17).

In another Australian case the question as to the standard of proof in cases of statutory reversal of onus was again discussed. In Walker v. Chapman, Ex parte Chapman (1904-05) St. R. QD. 330, the relevant statutory provision was again section 144 of the same Act. The Court held that the answer to the question as to the standard of proof in so far as section 144 was concerned must necessarily be found from the legislative intention in that enactment and that in endeavouring to get at this intention, if the language of a particular enactment was clear and express and there was no doubt about its meaning, the court must give effect to it, although it may operate with hardship or injustice; but, that, if, there was a want of clearness or definiteness of expression about it - as was the case with s.144 - then the court was at liberty to give it that meaning which appear most agreeable to convenience, reason and justice. The court then went on to say:

"The provisions of this section are startling, for by it the averment of the prosecution 'shall be deemed to be proved in the absence of proof to the contrary'. It amounts to this, that if the offence charged is correctly stated,

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the party charged is to be deemed guilty until he proves his innocence. Guilt is established by a piece of paper. This is reversing, with a vengeance, the principle of our criminal law that a man is to be deemed innocent until he is proved by legal evidence to be guilty. Speaking with all respect to the Legislature, I humbly think this is a pernicious method of proof to introduce into the criminal law. The Full Court of New South Wales has in Ex parte Healey ... decided that the object of this section is to relieve the Crown from the necessity of proving the case by oral evidence, and to make the information prima facie evidence of the charge, but does not throw upon the accused the burden of proving his innocence; and that if evidence is called for the defence, the Magistrate must consider the whole of the evidence before him, and if not satisfied that the charge laid has been proved must give the accused the benefit of the doubt....

If the interpretation put upon the section by Ex parte Healey is correct, it certainly, to some extent, mitigates the rigour of the law, if it carried the construction any further than the words express."

(Ibid. 342-343).

If it is accepted that where a statutory reversal of onus deals with an essential ingredient of the offence, the accused is placed only with an evidential onus,

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and, it is submitted, that in the light of the foregoing cases it should be so accepted, then, it is further submitted, that the authority of those cases must necessarily be founded on the legislative intention in the relevant enactment in those cases. In the three cases discussed above the legislative intention was expressed in the form of a presumption against the accused thereby requiring him to tender proof to the contrary if he did not wish to be convicted of the charge. No reference whatsoever was made by the legislature to the imposition of a lighter standard of proof in cases where the essential ingredient of the offence was affected. It must be presumed that no distinction was ever intended by the legislature between statutory reversal of onus relating to essential ingredients of the offence and to matters which do not constitute such ingredients. Consequently, it must therefore, follow that in both of these cases the evidential onus is the appropriate onus required of the accused.

Finally, the placing of the persuasive onus on the prosecution in criminal cases is one of public policy. On the other hand, "there can be no consideration of public policy calling for similar stringency in the case of an accused person endeavouring to displace a rebuttable presumption" - R. v. Carr-Briant (supra, p.611).

Referring to this instant case Glanville Williams of Impossibility, R. Cross, Evidence, 2nd ed., 116.

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The other view, on the other hand, holds that the presumption means more than a rule of procedure in that commented:

"This judgment fixes the present view that a statute in these terms" ('unless the contrary is proved') "places the persuasive burden upon the accused. If the law is settled, the question of policy is not, and there is a strong case for rewriting the existing legislation so that it is made to refer only to evidential burden" - Criminal Law, The General Part, 2nd edition, p.899.

PRESUMPTION OF INNOCENCE

"In England every man is presumed to be innocent until he is proved guilty" - Glanville Williams, The Proof of Guilt, p. 183. Now what does the presumption of innocence mean? Does it merely mean that the burden of proving the guilt of an accused person is upon the prosecution? Or does it mean anything more than that? In recent times in the common law countries, much emphasis in criminal cases has been put on "the presumption of innocence": however, authorities deciding the content and meaning of this presumption are rare and conflicting. Generally speaking, there are two opposing views on this matter. On the one hand, there is the almost universal view that all that the presumption means is that "the prosecution, is obliged to prove the case against (the accused) beyond reasonable doubt. This is the fundamental rule of our criminal procedure and it is expressed in terms of a presumption of innocence", R. Cross, Evidence, 2nd N.Z. ed., 116.

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The other view, on the other hand, holds that the presumption means more than a rule of procedure in that it is "an instrument of proof created by the law in favour of one accused, whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created", - Coffin v. U.S. (1894) 156 U.S. 432 (S.C.) 459, and that the rule of procedure expounded by proponents of the first view is a result and forms part of the presumption.

It is now proposed to consider the substance of these two views. One of the staunch proponents of the first view was J.B. Thayer. Writing under the heading of The Presumption of Innocence in Criminal Cases in his book: A Preliminary Treatise on Evidence At Common Law, he said:

The presumption of innocence "is in a very compact form; and it seems plain that such a statement adds something to the mere presumption of innocence, for that, pure and simple, says nothing as to the quality of evidence or strength of persuasion needed to convict. But the rule includes two things: First, the presumption; and second, a supplementary proposition as to the weight of evidence which is required to overcome it; the whole doctrine when drawn out being, first that a person who is charged with crime must be proved guilty; that according to the ordinary rule of procedure and of legal reasoning, presumitur pro reo, i.e. negante, so that the accused stands

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innocent until he is proved guilty; and granted.
second, that this proof of guilt must displace
all reasonable doubt" (Ibid, 558).

As to the purpose of the presumption, Thayer said:

"It has ... a peculiarly important function, that
of warning our untrained tribunal, the jury,
against being misled by suspicion, conjecture,
and mere appearances. In saying that the accused
person shall be proved guilty, it says that he
shall not be presumed guilty; that he shall be
convicted only upon legal evidence, not tried
upon prejudice, ... which, if there were
no emphatic rule of law upon the subject would
be sure to operate heavily against him....

We observe, in this form of statement, that the
general rule of policy and sense requiring that
all persons shall be assumed, in the absence of
evidence, to be free from blame, - appears
in the criminal law, on grounds of fairness
and abundant caution, in an emphatic form, as
the presumption of innocence, and it is there
coupled with a separate special rule as to the weight
of evidence necessary to make out guilt."
(Ibid, 559-560).

Then he went on to illustrate the effect of the
presumption thus:

"It takes possession of this fact, innocence, as
not now needing evidence, as already established

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prima facie, and says: 'Take that for granted. Let him who denies it, go forward with his evidence' 'It is the right of this man to be convicted upon legal evidence applicable specifically to him, start then with the assumption that he is innocent, and adhere to it till he is proved guilty...'

(Ibid. 562-3).

And he finally concluded:

"[T]hat the presumption of innocence is often used as synonymous with this whole twofold rule, thus drawn out; but that it has not played any conspicuous part in the development of our criminal law except as expressed in the fuller statement given above." (Ibid. 565-6).

The other view, which was expounded in Coffin v. U.S. (supra), could best be seen by considering the case itself in some detail. It came up from the circuit court of the United States for Indiana, and was a proceeding against officials of a national bank who were convicted below of wilfully misapplying funds of the bank, and of other related offences. A great number of exceptions were taken of the charge given by the court to the jury. The principal exception was against the refusal of the judge to charge as he was requested on the subject of the presumption of innocence. He had been asked to charge that,

"the law presumes that persons charged with crime are innocent until they are proved

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by competent evidence to be guilty. To the benefit of this presumption the defendants are all entitled, and this presumption stands as their sufficient protection unless it has been removed by evidence proving their guilt beyond a reasonable doubt."

The judge refused to give this charge, but instructed the jury that they could not find the defendants guilty unless satisfied of their guilt beyond a reasonable doubt. The Supreme Court held that there was error in refusing the charge which was desired on the presumption of innocence. In arriving at its decision, the court first considered the question whether there was a distinction between the presumption of innocence and reasonable doubt, or whether the two are equivalents of each other. On the interpretation of the presumption of innocence the court held:

"Now the presumption of innocence is a conclusion drawn by the law in favour of the citizen, by virtue whereof, when brought to trial upon a criminal charge, he must be acquitted, unless he is proven guilty. In other words, this presumption is an instrument of proof created by the law in favour of one accused, whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created. This presumption on the one hand, supplemented by any other evidence he may adduce, and the evidence against him on the other, constitute the elements from which

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the legal conclusion of his guilt or innocence is to be drawn

Concluding then, that the presumption of innocence is evidence in favour of the accused introduced by the law in his behalf, let us consider what is 'reasonable doubt'. It is of necessity the condition of mind produced by the proof resulting from the evidence in the cause. It is the result of the proof, not the proof itself; whereas the presumption of innocence is one of the instruments of proof, going to bring about the proof, from which reasonable doubt arises; thus one is a cause, the other an effect. To say that the one is the equivalent of the other is therefore to say that legal evidence can be excluded from the jury, and that such exclusion may be cured by instructing them correctly in regard to the method by which they are required to reach their conclusion upon the proof actually before them. In other words, that the exclusion of an important element of proof can be justified by correctly instructing as to the proof admitted." (Ibid. 458-460)

And on the question of the evolution of the presumption of innocence and the doctrine of reasonable doubt the court said:

"The evolution of the principle of the presumption of innocence and its resultant, the doctrine of

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reasonable doubt makes more apparent the correctness of these views, and indicates the necessity of enforcing the one, in order that the other may continue to exist. Whilst Rome and the Mediaevalists taught that wherever doubt existed in a criminal case, acquittal must follow, the expounders of the common law, in their devotion to human liberty and individual rights, traced this doctrine of doubt to its true origin, the presumption of innocence, and rested it upon this enduring basis."
(Ibid. 460)

The judgment of Coffin's case was severely criticised by Thayer (supra 566 ff) on two grounds, namely (a) that the presumption of innocence itself contributes no evidence and has no probative value; and (b) that the presumption is purely a rule of procedure and not a substantive part of the common law.

In respect of the first ground Thayer commented:

"It is the office of a presumption, as such, to fix the duty of going on with argument or evidence, on a given question; and is only that

But in no case is there a weighing, a comparison of probative quality, as between evidence on one side and a presumption on the other While then it is true that a presumption may count as evidence, and be a substitute for evidence, in the sense that it will make a prima facie case for him in whose favour it operates, and while it is true that the facts on which a presumption is grounded may

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The practicability of conveying an artificial strength count as evidence, the presumption itself, i.e. the legal rule, conclusion or position cannot be evidence." (supra. 563).

While, no doubt, theoretically, the only effect of a legal presumption as a presumption is to throw on the party against whom it operates the burden of going forward with the evidence, it is, nevertheless, the usual practice for the trial judge to give to the jury the common charge that the presumption remains until rebutted or destroyed by evidence to the contrary and this would seem to impart more or less artificial force to the presumption in the minds of the jury. Whether it reaches them in the form of a conclusion of law closely bound up with the rational inference or through the medium of a more or less unconscious colouring of the facts, the jury may find nothing illogical in balancing the presumption as a whole against other logical inferences. The presumption having, in this sense, in fact probative force with the jury it is not surprising therefore that the court in Coffins' case held that the presumption of innocence was evidence.

Theoretically there would seem to be no difference in the results reached by the two theories: under Thayer's theory, a higher degree of proof is required to overcome the rule of the substantive law accompanying the presumption; in Coffin's case, more evidence to rebut the presumption. There might well be a practical advantage, however, in presenting the presumption to the jury as an inference as in Coffin's case, thus avoiding a more complicated rule as to degree of proof.

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The practicability of conveying an artificial strength to a logical inference to be formed by the jury, as propounded in Coffin's case, though less scientific scarcely deserves the severe criticism that it has suffered.

With regard to the second ground of Thayer's criticism let it be assumed for the moment that, as he said, the presumption of innocence is purely a rule of evidence. Cooley expressed the view that "there are no vested rights in the rules of evidence" - Constitutional Limitation, 7th ed. (1903) p.524. It therefore, follows that since the presumption of innocence is only a rule of evidence there is no question whatsoever of the presumption being infringed or eroded. Indeed, such a view was promoted by Paul Brosman in an article on The Statutory Presumption (1930-31) 5 Tulane Law Review, 181 in which he said:

"Many of the cases making up this majority simply deny that the application of the particular statute results in a deprivation of the presumption of innocence.... This seems to be upon the theory that the presumption of innocence itself is rebuttable, and the legislation simply defines the amount of evidence which is sufficient to overbear it. On principle, however, it is difficult to see how any statutory presumption as they are applied in criminal cases today is inconsistent with the legal notion embodied in the term 'presumption

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Const of innocence." John, p.135. However, on the
 Another commentator had put the matter thus: and liberty
 are similarly exposed to the mercy of the courts, in that
 "Against the policy that an accused must be
 the House of Lords or the Privy Council, for instance,
 proved guilty beyond a reasonable doubt and
 can with a stroke of the pen totally remove the presumption
 need not introduce evidence to exculpate
 of innocence from the criminal law and replace in its
 himself, must be weighed the probability of guilt
 stead the presumption of guilt against the accused,
 which proof of the preliminary facts unrebutted
 casts on the accused in the light of the actual
 are : experience of the community. In the face
 of the difficulty of getting testimony,
 "[It is only, where constitutional law is
 as in fraudulent bank insolvency and
 law concerned, in that small but vital sphere where
 liquor cases, the necessity of adequate
 liberty of person and of speech are guarded that
 law enforcement and social and economic
 it means the rule of the common law. For there
 security, the common law presumption of
 along has Parliament seen fit to leave the
 innocence must fail". (1925) 25 Col. L.
 the law substantially unaltered and to leave that
 Review. 1082.

Those two extracts relate to the rights and liberty
 of the individuals in the United States of America.
 They, at least, have their fundamental rights and liberty
 specifically set out in and guaranteed by, for
 It is submitted, that the presumption of innocence
 example, the first eighth and fourteenth amendments to
 was the creation of the common law for the guaranteed
 the constitution of the United States of America.
 and protection of the liberty and freedom of the
 But what about the inhabitants of England or for that
 individuals that Dicey mentioned. As the Supreme
 matter New Zealand where there is no written constitution
 Court in Coffin's case apply put it:
 to safeguard their rights and liberty. Of course, there
 "[The exponents of the common law in their
 can be no protection, against the legislature, as in these
 devotion to human liberty and individual
 countries, Parliament being supreme, can repeal, modify
 rights traced this doctrine of doubt to its
 or temporarily set aside any law, including common law,
 true origin, the presumption of innocence,
 statute law and case law, even though such law guarantees
 and rested it upon this enduring basis".
 fundamental rights: The English Government and
 (supra. 49).

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Constitution, E.R. John, p.135. However, on the basis of Thayer's view these people's rights and liberty are similarly exposed to the mercy of the courts, in that the House of Lords or the Privy Council, for instance, can with a stroke of the pen totally remove the presumption of innocence from the criminal law and replace in its stead the presumption of guilt against the accused.

Surely, the rights and liberty of the individuals are more secure than that. Dicey held that:

"[I]t is only, where constitutional law is concerned, in that small but vital sphere where liberty of person and of speech are guarded that it means the rule of the common law. For there alone has Parliament seen fit to leave the law substantially unaltered and to leave that the protection of the freedom of individuals to the operation of the common law."

An Introduction To The Study of the Law of the Constitution, 10th ed. p. civ.

It is submitted, that the presumption of innocence was the creation of the common law for the guarantee and protection of the liberty and freedom of the individuals that Dicey mentioned. As the Supreme Court in Coffin's case aptly put it:

"[T]he expounders of the common law in their devotion to human liberty and individual rights traced this doctrine of doubt to its true origin, the presumption of innocence, and rested it upon this enduring basis".

(supra. 460).

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The rule of law, according to Dicey, is based upon the liberty of the individual: guided by this view of his "The rule of law is an expression of an endeavour to give reality to something which is not readily expressible; this, with the difficult is due primarily to identification of the rule of law with the concept of the rights of man; ... it is real and must be secured principally, but not exclusively by the ordinary courts." (supra. p. cix).

How are these rights and liberty of the individual secured but by the presumption of innocence and guarded by the ordinary courts. In its application in criminal cases through its guardians, the courts, the presumption found expression in the doctrine of proof beyond reasonable doubt: Coffin's case. And in this expression the one golden thread - that it is the duty of the prosecution to prove the prisoner's guilt - is seen throughout the web of the English criminal law: Woolmington's case (supra).

It is of interest to note in his treatise on The Presumption of Innocence in Criminal Cases (supra) Thayer, remarked, at the very outset: "Our administration of the criminal law today, in a period when the substantive law is merciful, is sadly enfeebled by a continuance of some rules and practices which should have disappeared with the cruel laws they were designed to mitigate." (p. 551).

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One wonders whether his interpretation of the presumption of innocence was guided by this view of his. His view was certainly reflected in the interpretation of the same. If Thayer is alive today he would no doubt, be amused, if not concerned, with the twist in irony of his statement. The mercy of the substantive law of his day has now been swallowed up in countless numbers of cases by the legislative magic formula, "... shall unless the contrary be proved be deemed to be guilty of the offence," such as section 67(8), Summary Proceedings Act 1957 and other similar statutory provisions. As the court in Ex parte Chapman (supra) pointed out:

"[T]he party charged is to be deemed guilty until he proves his innocence. Guilt is established by a piece of paper. This reversing, with a vengeance, the principle of our criminal law that a man is to be deemed innocent until he is proved, by legal evidence, to be guilty." (p.342).

EROSION OF THE PRESUMPTION OF INNOCENCE

In the preceding discussion it was seen that the presumption of innocence requires the prosecution in a criminal case to prove the guilt of the accused beyond reasonable doubt. On the other side of the coin it means that all acts and conduct of the accused are presumed to be in accordance with law - Halsbury Laws of England, 3rd ed. Vol. 15, paragraph 622. "All acts and conduct" must be taken to mean all acts and conduct

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relevant to or connected with the offence charged
(a) against the accused, irrespective of whether they
relate directly to the essential ingredients of the offence
itself or to the exempting provisions thereof. To discharge
its burden of proof the prosecution must, therefore, prove
beyond reasonable doubt (a) that the accused committed
the acts or conduct in question and (b) that these acts
or conduct are not innocent but against the law and not
excused by it.

Thus in a criminal trial the accused starts with
the presumption of innocence in his favour. That
stays with him until it is driven out of the case by
evidence tendered by the prosecution and until such
an event he is endowed by the presumption of innocence
with the right to sit back and remain silent. Only when
the prosecution's evidence shows beyond a reasonable
doubt that the offence as charged has been committed
that the accused is required to come forward with
evidence to rebut the prosecution's case, and he
has done so if he raises a reasonable doubt to it.

Now, in so far as the common law rule, the
principle of Turner's case (supra) and the statutory
reversal of onus require an accused to tender evidence -
be it on the basis of an evidential or persuasive
burden - before the prosecution has proved beyond
reasonable doubt the two ingredients above mentioned,
then he is required to do something which, by virtue
of the presumption of innocence, he is initially
endowed with the right not to do. To recapitulate

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what was discussed in the early part of this paper -

(a) the common law rule requires the accused, in cases where the exempting provision is in the form of a proviso, to come forward with prima facie evidence with regard to the particular exemption he desires to take advantage of before the prosecution is obliged to prove that he is not excused by the exemption. This is, indeed, an unjustifiable deviation from the principle of the presumption of innocence. It has, however, been said that the purpose of reversing the onus in such a case is to require the accused to particularise his excuses as are provided in the exempting provisions. But, surely, if that is the case, the accused need no more than plead the particular excuse, or excuses he desires to claim;

(b) similarly, the principle of Turner's case and statutes reversing the onus of proof require accused persons to come forward with evidence before the prosecution has even proved its case.

Therefore, to the extent to which an accused is required to do anything at all before his guilt has been established by the prosecution beyond reasonable doubt, the presumption of his innocence has been invaded. To say that an accused is presumed innocent and at the same time compelling him to prove his innocence is a contradiction in terms. However, there is no question as to the validity of such an invasion by the legislature, which, as pointed out above, is supreme. As regards the courts the position is quite different. While the function of the courts is simply to administer the law without going beyond the natural construction of the statute,

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nevertheless, under and by virtue of the Judicature Act, they are empowered to make, repeal, amend or modify rules pertaining to the procedure of the courts in the conduct of proceedings within them. No doubt the onus of proof beyond reasonable doubt by the prosecution is a rule of procedure requiring the prosecution to establish the guilt of the accused beyond reasonable doubt. However, as has been made out earlier on, this rule is merely the practical expression of the substantive common law presumption of innocence. As the court in Coffin's case held the presumption is the cause and the rule is the effect. To repeal, amend or modify the rule in any manner whatsoever is necessarily to do the same to the presumption which the courts are not empowered to do. But this was what the courts did exactly in the case of the common law rule and in cases where the principle of Turner's case was applied. For the reasons already mentioned, it is submitted, that what the courts did in these cases was completely without authority and was therefore invalid.

It is sad to see that "the golden thread" as Lord Sankey expressed it, which "runs through the web of the English criminal law" is today regarded by Parliament with indifference - one might almost say with contempt. The Statute Book contains many offences in which the burden of proving his innocence is cast on the accused. In addition, the courts, as the above discussion has shown, have enunciated principles that have the direct effect of eroding the presumption of the accused's innocence. There has never been any reason

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of expediency for these departures from the cherished principle, it has been done through carelessness and lack of subtlety. What lies at the bottom of the various rules for eroding the presumption is the idea that it is impossible for the prosecution to give wholly convincing evidence on certain issues from its own hand, and it is therefore for the accused to give evidence on them if he wishes to escape. But this kind of invasion for whatever reason strikes at the very core of what the court in Coffin's case called "the enduring basis" of the criminal law.

While it is lamentable to note that extensive inroads have been made into the presumption of innocence by statutory reversals of onus of proof and that those who are of the view that the doctrine of parliamentary supremacy in the second half of the twentieth century is but a legal fiction will have cause to regret the appearance of more of such statutory provisions, it is, indeed, far worse to observe that the courts which are purportedly the guardians of individual rights, freedom and liberty, are, themselves, directly participating in the erosion of the presumption of innocence upon which such rights freedom and liberty are based. In doing what the courts had done, they had, as it were, vacated their judicial and impartial position to sit on the scale of justice with the prosecution against the accused. If the only guardian of individual rights, freedom and liberty forsakes, its duty where else would the accused look to for justice.

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HOW RELEVANT ARE CRIMINAL ONUS AND EXCULPATIONS AND THE PRESUMPTION OF INNOCENCE IN PRACTICE?

In a trial by jury the function of the presiding judge is to consider whether the evidential onus has been discharged by either the prosecution or the accused as the case may be; and if the answer is in the negative the judge will withdraw the particular issue from the jury, but if it is in the affirmative, he will leave that issue to the jury. In so doing he will also direct the jury as to the proper standard of proof that is required in the particular case. Once the issues are left to the jury the application of the different standards of proof as directed by the judge is entirely at the mercy of the jury.

Juries are presumed and expected to understand and follow the direction of the judge concerning both the incidence of the burden of proof and the state of mind of each juror required for a finding by him that the burden has been discharged. Every judge must be faced with the problem of communicating to the jury a guide for their deliberations. No lawyer need be told of the inadequacies of words as a means of communicating legal concepts to laymen, but all will, probably, agree with Judge Jerome Frank:

"But no matter what the difficulties may be to the jury, surely the most important part of the judge's charge relative to the facts - i.e. that of dealing with the burden of proof - ought to be so worded that the jurors

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can comprehend it". - Larson v. Jo Ann Cab Corp.
 (1954) 209 F. 2nd, 929, 935.

Yet after having demonstrated the likelihood that the use of the usual language will mislead and that to speak of "a degree of conviction favourable to his contention" is still more likely to mislead, and after citing numerous non-legal authorities to show the dangers in the use of ambiguous phrases, be upheld a charge which made use of both phrases and multiplied the ambiguities, because it was on the whole no worse than the orthodox charge. He ended in effect with the counsel of despair that attempts to improve the orthodox charge should be postponed "until such time as we have satisfactory returns from checks of popular reactions to the traditional formulas".

If the legal experts, by their own admission, are uncertain as to the exact message of these "ambiguous phrases" how very much more confused and uncertain would the laymen of the jury be:

"The truth is that in allocating the burden of persuasion and explaining to the jury their duties with reference to it the courts have been performing their functions with a minimum of efficiency and with what President Eliot of Harvard once described as a maximum of intellectual frugality" - E.M. Morgan, Some Problems of Proof (1956)

Even where the jury do understand the judge's

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called wayward or perverse verdicts. The type of direction, which is, perhaps, unlikely, the absence of information on the working of the jury coupled with the fact that no reasons are given for their verdict would render any investigation as to whether they have properly followed the direction impossible. While jurymen are on oath to give a true verdict there is practically no means of determining whether the oath has been consciously or otherwise breached when they return a verdict totally inconsistent with the evidence adduced.

In certain types of cases the blatant resistance of the jury to the enforcement of the law is most apparent. This is so, for instance, in driving offences in the United Kingdom. The jury's sympathetic reluctance to commit motorists of driving "under the influence", of dangerous driving, and of "motor manslaughter" is well known. In many such cases the weight of evidence and the burden of persuasion, as far as the jury are concerned, has no relevance whatsoever. Lord Goddard commenting upon the problem wryly observed that:

"no one has yet been able to find a way of depriving a British jury of its privilege of returning a perverse verdict". 191 H.L. Deb. 85.

In any analysis of 115 jury verdicts resulting in the acquittal of the accused, Sarah McCabe and Robert Purves in their paper The Jury at Work (1972) observed that 15 of these verdicts (that is approximately 13% of these 115 verdicts) could almost certainly be verdicts in accordance with the law of the matter, as

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called wayward or perverse verdicts. The type of case they most frequently encountered in which this pattern of jury behaviour was exemplified was that of assault involving an element of provocation, where, however clearly the judge explained the law, however strenuous his emphasis that in assault cases provocation is no defence, juries in the areas under the co-authors' review would predictably acquit a defendant who acted, not in self-defence, but under a degree of provocation.

In one case:

"A man of previous good character, while walking across a private field, was approached by the owner and told to go back and not to trespass on the land in future. As the field had been used by many people daily and for some time as a short-cut, the man asked if he would be allowed to cross on this occasion; details of what happened thereafter became confused when related in court, but the man pushed the owner of the field aside, causing him some slight injuries, and found himself as the defendant in this case answering a charge of assault.

Technically, the only defence available to him was, one of self-defence, which he was hardly able to make out. But he had undoubtedly been provoked, had reacted with some violence but, under the circumstances, with remarkable restraint, and was acquitted by a jury after only 23 minutes." (Ibid. 33).

The reluctance of some juries to give their verdicts in accordance with the law of the matter, as

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it is explained to them by the judge, is, according to the same co-authors, further illustrated by their tendency to acquit defendants, however strong the evidence from the technical viewpoint when what is tried is a matter of assault arising out of a domestic or merely local feud. The following is a case in point:

"A young man was charged with burglary and theft from the house of a former girl-friend. He dismissed his counsel and conducted his own defence. He had been positively identified as he ran away from the house by the girl, who would have known him well enough to do so; and his alibi, that at the time of the incident he was returning from visiting friends at some other part of the city, was unsupported by witnesses and flimsy in the extreme. But in court his questioning of the girl took the form almost of an informal discussion between erstwhile friends talking over old times. He was acquitted after half an hour. The sentiment of the jury in such cases seems to be that it is not the court's place to intervene and decide the rights and wrongs of issues arising out of what might be a long history of personal differences, the full details of which will almost certainly never come out during the trial."

(Ibid. 34).

In such cases of assaults involving provocation and domestic disputes the juries' sympathy for the accused may contribute at least a possible explanation for

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the mentality of a child, that he would perhaps his acquittal. Of course, it is extremely difficult to estimate the exact influence of the element of sympathy in acquittals. Even in those cases subjected to the analysis of controlled jury-type deliberations, McCabe and Purves observed that sympathy for the accused was rarely expressed with any great clarity, but that, rather this sympathy seemed to manifest itself indirectly as a reluctance to consider the evidence against the accused in as rigorous, and detached, or as critical a manner as they might have shown against a less sympathetic accused.

Occasionally, however, the jury may return an acquittal which goes beyond mere sympathy, mercy, or "fair play" and merges into what might properly be described as perversity of a truly serious degree. McCabe and Purves found one such case in their research:

"A hotel porter, motivated perhaps by a grudge against the manager of the hotel, started two fires within minutes of each other in different parts of the hotel. Fortunately, the fires were discovered before any damage to the building or any injury to hotel guests had been caused, and the porter was arrested and charged with arson. While in custody he wrote a letter to the manager which practically admitted guilt and apologised for the trouble he had caused, and also made a confession to the police. However, medical evidence was called to show that the porter had

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the mentality of a child, that he would perhaps to the effect that the jury had to be satisfied that sign a confession if he thought it would guilt had been proved. The judge later added: detain his release from custody, but that he "If you find on a full and fair consideration would lie about any matter if he thought that it is not safe to reject the account there was some immediate advantage to be had from doing so. So it proved in court; he told the most palpable lies under examination and cross examination and it seemed that a conviction was a foregone conclusion. But for reasons about which one can only speculate the jury acquitted and the defendant was released." (Ibid. 37).

On the other hand, there are many instances where the jury have convicted accused persons in the face of overwhelming evidence to the contrary, for example, in the case of alleged "murder by motor car", namely Murtagh and Kennedy [1955] Cr. App. R. 72. In that case the first accused had killed a man when he drove on to the pavement with his motor car, and the contention of the prosecution was that the killing was intentional and was done to satisfy a grudge because of a fight that had occurred earlier. The contention of the accused was that he had seen the deceased take up a coal-cellar lid for the purpose of throwing it on the accused's car, as he had done before, that the accused had ducked, and that the resulting swerve of the car on to the pavement was purely accidental. The trial judge told the jury that the burden of proof from beginning to end rested on the prosecution, but all that he told them on the question of quantum of proof was the then usual formula

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to the effect that the jury had to be satisfied that guilt had been proved. The judge later added:

"If you find on a full and fair consideration that it is not safe to reject the account of these two men that this was a pure accident, ... acquit them both."

The jury convicted the driver of murder and his passenger the second accused of manslaughter. Owing to the restrictions imposed upon appeal from a verdict of a jury, it was not considered possible to challenge the conviction on the facts, and instead, an appeal was argued on the question of the law whether the direction of the judge was adequate. The appeal fortunately succeeded, on the ground that since the two accused had put forward an explanation of their conduct consistent with their innocence - that is, they had discharged their evidential onus - the judge should have directed the jury that if they accepted this explanation they must acquit. The judge's reference to the possibility of its not being safe to reject the defence was not considered an adequate substitute for the instruction in terms of doubt as to the defence.

The danger of leaving the jury without a proper direction on the possibility of doubt, or where such a direction was given, the extreme risk of leaving the accused at the total mercy of the jury may be illustrated by the facts of the case just given. The defence was not merely a plausible hypothesis provided by defending counsel, although of course even a hypothesis

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would need careful consideration and attention. In actuality, as was pointed out by the Court of Criminal Appeal, the evidence established that before the tragedy the accused had twice been to the police station to invoke the help of the police against the deceased, and must have known when they drove for the last time to the spot where the killing was shortly destined to take place that the police would be there either by the time when they arrived or within a very short time. This made it seem unlikely that the driver would have decided upon an intentional murder. In addition, witnesses for the prosecution corroborated the defence's evidence that the deceased at the time when he was struck, either was lifting the coal-cellar lid with the intention of throwing it or had already lifted it and was holding it up in a throwing attitude. Taking the evidence as a whole, with the improbability of murder in the circumstances and the proof of the facts bearing out the defence of accident, it should have told strongly in favour of the defence. If there is any meaning in giving accused the benefit of doubt, especially on a charge of murder, Murtagh should have been given it. Yet the jury convicted him of murder, and part of the responsibility of what must be taken to have been an incipient miscarriage of justice, may, perhaps be attributed to the form of the summing up, which avoided reference to the possibility of doubt. Even so, it may fairly be said that the jury did not come very creditably out of the case. The accused had cause to bless the minor blemish in the summing up, which gave them the effective right of appeal, otherwise, it would

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have been cold comfort indeed to them to know that to succeed in their defence of accident they only have to discharge the evidential onus of proof cast on them and that their freedom and liberty, enshrined in the presumption of innocence are entrusted to those twelve reasonable men "the correctness of whose verdict has almost come to be an axiom" - Humphreys, A Book of Trials (1953) p.17.

In a summary trial without a jury a magistrate is both a trier of law and of fact. In such trials speed seems to be the criterion at the expense of everything else including the rules of procedure. The U.S. President's Commission on Law Enforcement And Administration of Justice: Task Force Report: Courts (1967) made the following report on the administration of justice in lower criminal courts in the United States of America:

"In the lower criminal courts ... rules of evidence are largely ignored. Speed is the watchword. Trials in misdemeanor cases may be over in a matter of 5, 10 or 15 minutes; they rarely last an hour even in relatively complicated cases. Traditionally safeguards honored in felony cases lose their meaning in such proceedings; yet there is still the possibility of lengthy imprisonment or heavy fine....Staff observations in one city were summed up as follows:

'A few defendants went to trial, but the great majority of them did so without counsel.

case in the London Magistrate's Court as follows:

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In these cases the judge made no effort to explain the proceedings to the defendants or to tell them of their rights to cross-examine the prosecution's witnesses or of their right to remain silent. After the policeman delivered his testimony, the judge did not appear to make any evaluation of the sufficiency of the evidence but turned immediately to the defendant and asked, "What do you have to say for yourself?"

Having himself observed the proceedings of summary trials in the Magistrate's Court in Wellington on a number of occasions, the writer, is very much inclined to sum up his observations of the same in the same manner.

Rules of evidence provide a procedural means whereby the courts are obliged to adopt in endeavouring to determine the truth of an issue, which in the case of a criminal trial means the guilt or innocence of the accused. The determination of the truth of an issue is, in the nature of the subject matter, a purely subjective matter of belief. However, any such belief which is not arrived at in accordance with the relevant rules of evidence must necessarily be invalid. Time and again, however, magistrates seem to do just that. Not only do they make no pretence in disregarding the rules of evidence, but they also make it clear that their belief is coloured by their prejudices which, of course, are completely irrelevant in the present context. Glanville Williams, in illustrating this point, mentioned a case in the London Magistrate's Court as follows:

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"In a letter to the Evening Standard, May 18, 1955, Mr C.H. Norman: 'We magistrates must support the police in these cases, London stipendiary magistrate whom he named, where the evidence for the Crown consisted entirely of police and official witnesses. All the policemen admitted in cross-examination that they had altered their notebooks to agree with one another. The defendants called many independent witnesses besides giving evidence on their own behalf. The magistrate convicted, saying privately to Mr Norman: "We magistrates must support the police in these cases otherwise we should be lost" - The Proof of Guilt, p.325

Magistrates tend to believe the police officers who appear before them regularly, and, as Glanville Williams put it, "who are generally found to speak the truth and perhaps never caught out in a lie, though regularly alleged to be lying by defendants". However, a policeman's word should not be taken against that of the citizen merely because the former is in uniform, and on a conflict of evidence it is always necessary to ask whether the case has been brought home beyond reasonable doubt. Again to quote Glanville Williams:

"Although it is doubtless rare for a policeman to give wilfully false evidence against a man whom he believes innocent, it is not unknown for a policeman who believes, the defendant guilty (as he generally does) to embroider and

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garbled?

strengthen his evidence with the object of
 procuring a conviction. Also, despite many official
 denials that promotion in the Force depends upon
 securing convictions, it is probably true to
 say that some young constables believe that it
 does. For these reasons an uncritical
 acceptance of all police testimony which is
 sometimes observed in magistrates' courts, is to
 be deprecated." (Ibid. 325). by Constable Merrick.

Merrick escorted him to the police van without
 Even in New Zealand some magistrates appear to
 speaking to him apart from exclaiming "Not you
 again - here we go again". Terry O'Neill's
 police say is always right and to them rules of
 evidence and the presumption of innocence are simply dead
 letters. An illustration of this is the case of an
 accused who was brought before the Magistrate's Court
 in Wellington on a charge of inciting disorder.

Salient, April 11, 1973 made the following report:"

"For the prosecution, Constable Merrick stated
 that O'Neill (the accused) was pushing and
 jumping up and down in a crowd that the police
 were trying to control, waving his arms above
 his head and shouting encouragement to the crowd.
 Constable Merrick was unable to recall the words
 used by O'Neill. Counsel for the defendant
 suggested that his client could have shouted
 'Leave the police alone for all you know'. and more
 Counsel also suggested that O'Neill could have
 merely been trying to see what was going on.
 Merrick denied this and stated that the defendant
 was having an obvious effect upon the crowd, although

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to the could not give any example of this. Merrick
 have admitted having arrested O'Neill before 'a few
 of times', but denied holding a grudge against
 made him. In a similar decision, with similar comments,
 In O'Neill stated that he had left a hotel with some
 friends and that the party was walking through
 the crowd to get to their car. He heard
 a man in front of him yell something and was
 suddenly grabbed from behind by Constable Merrick.
 Merrick escorted him to the police van without
 speaking to him apart from exclaiming 'Not you
 again - here we go again'. Terry O'Neill's
 statement was confirmed by two witnesses
 Both witnesses stated that the defendant had
 neither jumped, shouted or waved his arms. Both
 witnesses similarly stated that the police
 evidence was totally incorrect.
 Summing up, counsel for the defendant pointed
 out that no disorder had been shown to have
 resulted from the incident"
 [The magistrate] "took no time at all to deliberate
 the facts further. His final pronouncement was
 'The police evidence was said to be a lie.
 I'm in the position of deciding credibility, and,
 taking all matters into account I'm satisfied that
 the police evidence is correct'
 'The duty of the police is getting more and more
 - anyone getting in the way must be
 severely dealt with.'
 It is a common practice among magistrates

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to be reluctant to consider that a policeman may have lied in court. Earlier this year in the case of Jesus Christ v. The Police (the same magistrate) made a similar decision, with similar comments. In neither instance did he bother to explain the reason for his decision"

In cases such as this the layman must be excused for forming the impression that the courts have deserted their judicial seat and throwing in their lot with the prosecution.

The unpredictability of juries' verdicts and the uncertainty of magistrates' decisions have to a large extent blurred the concept of criminal justice, namely the determination of the guilt or otherwise of the accused, in that they have led to the practice of "plea-bargaining" whereby, through negotiation between the prosecution and the accused rather than by actual trial itself, the parties may agree between themselves as to such guilt or innocence. There is, of course, a clear distinction between on the one hand, the defendant who decides to plead guilty to the count, or to all the counts, preferred against him on an indictment and, on the other hand, the defendant who pleads guilty only to one, or some, but not to all, of the counts on the indictment. The plea of not guilty to all remaining counts on the indictment if accepted by the prosecution and provided that the judge agrees to the arrangement of pleas are generally put aside with the note that they are "to be left on the file and not proceeded with except by leave

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of the Court."

A study by Sarah McCabe and Robert Purves, reported in their paper By-passing the Jury (1972) of cases of guilty pleas by 112 defendants showed that 48 of the 112 defendants pleaded guilty to the whole indictment as it stood, and the other 64 defendants had an arrangement of pleas accepted by the court. The exact reasons for a defendant's decision to change his plea will obviously vary from case to case. But in the cases under the co-authors' review it was pointed out that in most, if not all, cases the change followed after the defendant received "certain good advice" from his legal representatives and that this is especially the case with late or last-minute changes of plea where counsel, after reviewing his brief and assessing the evidence, speaks urgently to solicitor and defendant in a conference held, in all too many cases, immediately before the trial is due to start. In such cases it would appear that the defendant's legal representatives, drawing on their general court experience and their knowledge of the supposed idiosyncrasies of the local judiciary, play a crucial role in the plea-changing process. The roll is even more extensive where what is involved is an acceptable arrangement of pleas, as this entails not only giving good advice to the defendant, but also negotiating with the prosecution, occasionally drafting an amendment to the indictment, and discussing the proposed arrangement with the judge.

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The term "plea-bargaining" has two quite distinct aspects. First, there is the plea-bargaining as understood by Lord Parker and now controlled by his decision in R. v. Turner [1970] 2 All E.R. 281 at 285, where all that is in issue is the judge's intimation as to the sentence he is minded to impose either upon conviction or upon hearing a confession. The only exception to this rule "is that it should be possible for the judge to say, if it be the case, that, whatever happens, whether the accused pleads guilty or not guilty, the sentence will or will not take a particular form e.g. a probation order, or a fine, or a custodial sentence." (Ibid. 285.)

Turner's case has undoubtedly put an end subject to the above exception, to this aspect of plea-bargaining in English courts. The important ethical and constitutional implications of the involvement of the judiciary in the bargaining process, the coercive influence of the judge and the occasional repudiation of his bargain as understood by the defendant, have much exercised American observers, (see D.J. Newman, "Official Inducement to Plead Guilty. Suggested Morals for a Marketplace", University of Chicago Law Review, Vol. 32 (1964) p. 167) but have become practically irrelevant in the English courts. Admittedly one of the directions given in Turner's case provided that discussions involving plea-bargaining should be conducted in the presence of the judge with the lawyers for prosecution and defence, but this does not seem to entail in practice that the

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judge is thereby dragged deeper into the mire of prosecution, gives the defendant the advantage of his plea-bargaining. As the question of mitigation of advice. It is this second aspect of plea-bargaining that sentence seems to be the chief foundation of the plea-leads the prosecution, frequently, to over-charge the bargaining process, the decision in Turner's case must accused, that is, to insert every charge which could be interpreted as a direction to the judiciary to reasonably be said to arise from the situation even when withdraw substantially from whatever part it may have it is clear that it is unlikely that every charge could played in the persuasive or coercive aspects of the be proved on the evidence available. McCabe and Purves process and at the same time to supervise even more in By-passing The Jury (supra, 19) illustrated this point intimately the formal negotiations conducted between counsel for prosecution and defence. The judge, then, since Turner's case is no longer able to contribute effectively to those parts of negotiations aimed at inducing the defendant to change his plea, although questions arising from the nature and force of the inducements applied to defendants in America at various stages in the whole process and the possibility of judicial perfidy implicit in any breaking of the bargain, have received the keen attention of observers of the American situation (see A. Davis, "Sentences for Sale: A New Look at Plea Bargaining in England and America" [1970] Crim. L.R. 227).

The second aspect of plea-bargaining is of greater importance and occurs daily with judicial approval. This aspect covers the discussions and negotiations which culminate in the defendant's decision to plead guilty to the charge (or all the charges) against him or, alternatively, to some of the charges as part of an acceptable arrangement of pleas. The defence counsel having examined his brief, reviewed the evidence, conferred with his instructing solicitor and sometimes with

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prosecution, gives the defendant the advantage of his advice. It is this second aspect of plea-bargaining that leads the prosecution, frequently, to over-charge the accused, that is, to insert every charge which could reasonably be said to arise from the situation even when it is clear that it is unlikely that every charge could be proved on the evidence available. McCabe and Purves in By-passing The Jury (supra, 19) illustrated this point with this case:

for the assurance of a guilty plea to a lesser charge. "The defendant well-known to the police, was found This is especially the case when the lesser charge with shovels, lamps, spare wheels, tyre, hammer, reflects the explanation given by the defendant, an penknife, spanners, hacksaw and bar known to have explanation which, whether it seemed probable or been stolen from various sites. After enquiries improbable to the police, might be difficult to disprove and investigations concerning various similar before a jury:

thefts in the area, the police charged the defendant with 16 counts (half of them alternatives) and handling to which he pleaded not guilty, but was of burglary, theft and handling. The items prepared to plead guilty to the lesser charge of found in his possession were the subject of four of assisting in the commission of an offence. these counts. The defendant's explanation was that His explanation was that he and his girl-friend he had been given these items by a mysterious and had been approached by strangers in a pub who had unidentifiable Mr Smith, who had done all the asked for a lift home. The defendant agreed to burglaries. The prosecution, for want of this but as he drove them home he was asked to evidence on the other 12 counts, and in full stop next to a shop, and to appear to be courting awareness that a concurrent, if not a suspended his girl-friend while the stranger broke into sentence would be passed in any case, agreed to the shop and loaded the stolen goods into the vehicle. accept a plea of guilty to two counts of handling. He suspected that there was perhaps something The defendant was sentenced to six months on each dishonest about this, but he had got very little count, concurrent and suspended." profit out of it, he said.

(In such cases of over-charging it would appear that

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the prosecution is allowing for, if not to prompt, Furthermore, the prosecution will generally be plea-bargaining. There are very real and practical especially ready to reach a negotiated disposal of reasons for the prosecution's desire to seek an a case where the outcome consequent upon conviction acceptable negotiated disposal of a case. It is obviously on the more serious charge, or in some cases on all the the avoidance of the hazards of trial however strong charges, even if successfully achieved after a fight, the case, which inclines prosecution towards seeking would in effect be the same. The practice of concurrent a reasonable arrange of pleas. It is not sentences for multiple convictions will increase cases surprising that the prosecution is in many cases willing make the pressing of some charges in the indictment a to exchange the uncertainties of a contested trial pointless and costly exercise. for the assurance of a guilty plea to a lesser charge.

This is especially the case when the lesser charge reflects the explanation given by the defendant, an explanation which, whether it seemed probable or improbable to the police, might be difficult to disprove before a jury:

"[T]he defendant was charged with theft the counts and handling to which he pleaded not guilty, but was prepared to plead guilty to the lesser charge of assisting in the commission of an offence. His explanation was that he and his girl-friend had been approached by strangers in a pub who had asked for a lift home. The defendant agreed to this but as he drove them home he was asked to stop next to a shop, and to appear to be courting his girl-friend while the strangers broke into the shop and loaded the stolen goods into the vehicle. He suspected that there was perhaps something dishonest about this, but he had got very little profit out of it, he said." (McCabe and Purves, Ibid. p.21).

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defendant to confess to a crime which he has never committed.

Furthermore, the prosecution will generally be especially ready to reach a negotiated disposal of a case where the outcome consequent upon conviction on the more serious charge, or in some cases on all the charges, even if successfully achieved after a fight, would in effect be the same. The practice of concurrent sentences for multiple convictions will in some cases make the pressing of some charges in the indictment a pointless and costly exercise.

"The defendant, an undischarged bankrupt, was arraigned on an indictment containing a total of eight counts for obtaining credit, for extending his insolvency by gambling, and for failing to keep proper books of account. The evidence to support most, if not all, the counts was fairly strong, but the prosecution was well prepared to accept a plea of guilty to only two of the eight counts: and even these two counts were punished by concurrent sentences." (Ibid. p.22).

From the point of view of an accused person the most important objection against the practice of plea-bargaining is that such a practice may induce the innocent to plead guilty. The unpredictability of the jury's verdict and the uncertainty of the decision of magistrates, as pointed out above, coupled with pressures applied by enthusiastic police and efficiency minded prosecutors could be so great as to compel an innocent

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defendant to confess to a crime which he has never committed.

Considerations: A Study of Bargain, Justice

"The greatest danger inherent in the policy of utilizing the plea as a factor in sentencing is that innocent men will be induced to plead guilty" Comment in Vol. 66 Yale L.J.

merely (1956) at p. 220. "The Influence of the Defendant's Plea on Judicial Determination of Justice"

ignored plays a very insignificant part in the plea-bargaining process. "The most troublesome problem is the possibility that an innocent defendant may plead guilty

because of the fear that he will be sentenced more harshly if he is convicted after trial ..."

"The Negotiated Plea of Guilty" Task Force Report: The Courts, President's Commission, 1967, 171.

and practical approach adopted by police, defence and prosecution lawyers, judges... But it seems right to conclude, taking into account the reduced prosecution pressure and the exclusion of judicial involvement, that the possibility of an innocent and rational defendant in the English courts being induced by external pressures to plead guilty is far less than in the American courts.

Another obvious result of the plea bargaining process is the willingness of the defendant to plead guilty to a lesser offence which he did not, technically, commit. Newman's survey showed:

"In spite of the high incidence (56-7%) of admitted bargaining in the sample, however, only a very small proportion of cases admitted guilt to offenses grossly different from those alleged

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in the complaint". "Pleading Guilty for Considerations: A Study of Bargain. Justice" Vol. 46 (1956) Journal of Criminal Law, Criminology and Police Science, 780.

In all these cases, therefore, criminal justice merely means bargain and negotiations between the prosecution and the defence. The determination of the true guilt or innocence of the accused if not completely ignored plays a very insignificant part in the plea-bargaining process. As McCabe and Purves observed:

"A review of the 90 cases in the present study leaves a firm impression, substantiated by an examination of police and court documents, that changes of plea are the result of a realistic and practical approach adopted by police, defence and prosecution lawyers, judges and often, the defendants themselves...."

[The 90 cases] are generally disposed of after informal negotiations between lawyers of both sides acting not so as to impress and confound a jury by rhetoric, innuendo, suggestion, intimidation and manipulation of the rules of evidence and procedure, but in order to reach as expeditious and as economical an agreement as possible after an abandonment of pretence, a concentration on practical calculation and an open confrontation with hard facts and real probabilities" - By-Passing the Jury (supra, pp.

Crim. 26-27).⁹; The Times, August 19, 1963. This was

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As regards the presumption of innocence it has even been suggested that the presumption should be available to innocent defendants only and not to guilty ones.

Thus it was said that,

"The presumption of innocence is a shield designed for the protection of the innocent; it is not a weapon to be wielded in the hands of the guilty to frustrate the operation of the law and to evade the penalties they deserve." -

The Presumption of Innocence: Its Applicability To Prosecutions For Speeding Violations (1956)

47 Journal of Criminal Law, Criminology and Police Science 73.

This statement is fallacious for two reasons. Firstly, it is based on the false assumption that there is one presumption of innocence for the innocent and another for the guilty. There is only one such presumption and its purpose is not only to provide sufficient safeguard to accused persons but also to provide the means whereby the guilt or innocence of these people can be determined. The statement, however, presupposed the guilt or innocence of the accused and is, therefore, purely begging the question.

Secondly, the statement denies the accused's right to put the prosecution to its proof by pleading "Not guilty". An English case which comes very near to confirming this statement is R. v. Williams [1965] Crim. L.R. 609; The Times, August 19, 1965. This was

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an appeal by a man who had pleaded Not Guilty at his trial to a charge of what was at that time capital murder, but who had nonetheless been convicted. He asked the Court of Criminal Appeal to hear fresh evidence indicating that he suffered from an abnormality of mind which caused his responsibility to be diminished. The Court held that it could not receive this evidence because it could have been given at the trial. The reason why the appellant had not offered the evidence at his trial was because this would have amounted to an admission of guilt and he hoped by pleading Not Guilty to secure a complete acquittal. Assuming that he was indeed guilty, this was perhaps a reprehensible attitude on his part, but every accused person does have the right to plead Not Guilty, thus putting the prosecution to proof of its case. This right provides so valuable a safeguard in the English system of justice. Yet it seemed from Williams that if he exercised the right he ran the risk of being punished in a way which was not compatible with his mental state. Quite apart from any question of fairness to the accused, the result of the case seemed unsatisfactory from a general point of view. Statute had laid down a means whereby the courts could investigate the mental responsibility of the accused with a view to treating him in a special way (that is to say, by convicting him of manslaughter instead of murder) if this was found to be diminished. But because of a decision which he - ex hypothesi a man of abnormal mentality - made at his trial, the courts were debarred (or debarred themselves) from making this investigation.

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There is then the significant procedural change brought about by the introduction of majority verdicts in jury trials. The English Criminal Justice Act 1967 requires that a majority verdict (which must be 10 of a jury of 11 or 12 members, or 9 out of a jury of 10) is only acceptable after the jury has deliberated for at least 2 hours, and, should there be a verdict of guilty, the foreman of the jury must announce in open court the number of the dissenting minority. In cases of acquittal, on the other hand, failure to reach unanimity is not disclosed. Quite apart from the merits of the issue, this innovation is an unmistakable sign that the traditional doctrine that it is better that a guilty man should go free than that an innocent defendant should be wrongly convicted is losing its force.

Just how innocent is an accused person presumed to be in the actual operation of the judicial machinery then?

"It is greatly to be feared that the so-called presumption of innocence in favour of the prisoner at the bar is a pretence, a delusion an empty sound. It ought not to be but it is. Rufus Choate said that 'this presumption is not a mere phrase without meaning.' that 'it is as irresistible as the heavens till overcome'; that 'it hovers over the prisoner as a guardian angel throughout the trial'; that 'it goes with every part and parcel of the evidence';

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that it is equal to one witness'. This was
is just what it should be, but this is just what
it is not. Practically it is of no avail
whatever in the trial. The jury tread it under
foot; the judge the same moment he admits it in
theory forgets it in argument. It is a dead
letter. Nay, so far from being merely
inoperative, it is not hazardous to say that in
the trial the presumption is reversed. By court
and jury, by prosecution, police, and the
public the accused is presumed guilty. Let every
one, as he looks upon a prisoner in the dock,
carefully inquire of himself and answer if this
is not so" - Ten Years a Police Judge, Wiglittle
from Wigmore, Evidence, paragraph 2511.
And now jumping on the band-wagon are the
legislatures and textbook writers who are adding insults
to injury by encouraging and justifying the gradual
erosion of the presumption of innocence itself.

In the light of the foregoing one must always be
reminded of the true value and worth of the presumption
of innocence in the criminal law, in order to appreciate
the dangers that would arise in the event of any
erosion thereof. It is therefore fitting to conclude
with the following extract:

"Ammianus relates an anecdote of the Emperor
Julian which illustrates the enforcement of the
presumption of innocence in the Roman law.

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Numerius, the governor of Narbonensis, was on trial before the Emperor. Numerius contented himself with denying his guilt, and there was not sufficient proof against him. His adversary, Delphidius, a passionate man, seeing that the failure of the accusation was inevitable, could not restrain himself, and exclaimed "Oh illustrious Caesar! if it is sufficient to deny, what hereafter will become of the guilty?" to which Julian replied "If it suffices to accuse, what will become of the innocent?" [Quoted in Coffin's case (supra, 455)].

If the present trend of judicial and legislative erosion of the presumption of innocence continues, the concept of criminal justice as perceived by Delphidius will, before very long, become a frightening reality.

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