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Presumption in legal argumentation: from antiquity to the middle ages

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Title: PRESUMPTIONS IN LEGAL ARGUMENTATION: FROM ANTIQUITY TO THE MIDDLE AGES

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I

Presumptions help us make decisions under conditions of uncertainty. Such decisions are also the business of rhetoric, and so one might expect to find a discussion of presumptions in the ancient handbooks of that discipline; as a matter of fact, however, the term *praesumptio* there appears only to refer to the anticipation of counter-arguments, and is thus used as an equivalent to *prolepsis* (Quintilian 9.2.16-18). Instead, we find the concept of presumption as related to decisions about doubtful facts and the distribution of burdens of proof emerging in the context of Roman law. In this paper I will sketch in broad outline the transition of the concept of presumption from a relatively subordinate part of the Roman law to a central feature of legal disputations in the revival of Roman law in the Middle Ages. I will first discuss features of presumptions in the codification of Roman law that was undertaken at the behest of the emperor Justinian in the sixth century CE and later became known as the *Corpus Iuris*. In my discussion here, I will focus primarily on the *Digest*, a vast collection of juristic pronouncements by leading Roman jurists, collected from a literature spanning six centuries¹. Then I will focus on the treatment of presumptions in the second edition of the *Libellus Pylei Disputatorius*, written by Pilius of Medicina, composed in the second half of the twelfth century. In conclusion, I will briefly point to elements of these developments that may be useful in considering the renewed contemporary discussion about the role of presumptions in argumentation, a discussion that has been stimulated particularly by Richard Gaskins' *Burdens of Proof in Modern Discourse*, which highlights the paradigmatic significance of the rhetorical manipulation of burdens of proof in legal reasoning.

II

Even before the term *praesumptio* was used to denote the concept, the Roman jurist Quintus Mucius Scaevola introduced, at the turn from the second to the first century BCE, a presumption into legal controversies about the source of property that had passed to a woman. He argued that "when it is not clear where the property has come from, it is more correct and decent to hold that she got it from her husband or someone in his power." The later jurist Pomponius (second century CE), who transmitted this pronouncement to us, added the comment that "Quintus Mucius appears to have taken this view in order to avoid any disgraceful inquiry involving a wife" (D. 24.1.51). This early use of presumption in legal argumentation already shows the subtle interplay of

empirical and normative considerations that characterizes the treatment of presumptions in the Roman law of the *Corpus Iuris* as a whole.

Legal presumptions take as their starting point an established fact (in the example: a married woman holds property of uncertain origin), and then draw from this a conclusion about an uncertain matter (here: the origin of the property, which is presumed to have come from the husband). The structure of presumptions thus resembles that of arguments from probability, and in the Roman law we find several references to presumptions that people make as a matter of empirical fact. For instance, a father presumes his son missing in war to be dead (D. 12.6.3); people assume that slaves of some nationalities are better than slaves of other nationalities (D. 21.1.31.21), or that a more recently enslaved person will be easier to deal with than a slave of long standing (D. 21.1.37); or a father assumes that his wife will ultimately deliver to the children whatever part of his property she has taken (D. 31.67.10). In such cases, people form factual expectations on the basis of what they perceive to be likely. Legal presumptions may also be based on such perceptions of empirical probability, but they need not be. Once they are established, legal presumptions create an *entitlement* to the conclusion towards which they point (barring the possibility and permissibility of proof to the contrary).

The most fundamental legal presumption, that in favor of defendants, is a case in point. It is stated at the outset of the *Digest* chapter entitled "On Proof and Presumption" (D. 22.3.2): "Proof lies on him who asserts, not on him who denies." This rule is not based on the observation that plaintiffs are generally *less likely* to make believable assertions than defendants, but rather on the perception that it is *fairer* to impose the burden of proof on the plaintiff. This is even clearer when we look at the burden of proof in criminal cases, where in fact it is more likely than not that the defendant is guilty, since definitely more defendants are convicted than acquitted. And that the underlying judgment about the presumption of innocence is normative rather than empirical is made quite clear in what the jurist Ulpian reports to us (D. 48.19.6) about a rescript of the emperor Trajan, who held that in criminal cases nobody should be condemned on suspicion, because "it was preferable that the crime of a guilty man should go unpunished rather than that an innocent man be condemned."² The emphasis is here not so much on which presumption is more likely to be correct, but on which is less likely to lead to less acceptable consequences.

While generally it may be regarded as fairer to impose the burden of proof on the plaintiff, the law of presumptions also establishes modifications of this principle. Even before the general rule is stated in D. 22.3.2, the very first excerpt under the *Digest* title "Proof and Presumptions" (D. 22.3.1) establishes the exception that "[i]f the issue is whether someone has a clan or *gens*, he must prove it." Here the burden of proof is imposed on the party who is in a better position to provide the required evidence, regardless of whether that party is the plaintiff or the defendant.

One of the reasons why it is fair to shift the burden to the defendant may of

course be that it appears more likely that the plaintiff's assertion is correct. Thus for instance a defendant who has initially denied receiving a payment must prove that it was owed once it is later shown that he did in fact receive it, while generally the plaintiff who claims to have paid unowed money must prove that it was not owed (D. 22.25 pr.). Even without the legal presumption, an observer would be suspicious of a defendant who chooses to deny receiving money rather than admitting receipt and asserting that the money was owed, an assertion that would have the greater likelihood on its side, and that the plaintiff would then have to disprove. But the legal presumption does more than pointing to this shifted probability; it concludes that in such cases the likelihood of the defendant's liability is great enough to justify shifting the burden of proof, even though this will mean that some defendants will have to return money in fact owed to them, simply because they cannot prove that it was owed.³

This presumption also gives to the fact of denial of receipt of payment more weight than to all other potential credibility factors, such as the parties' reputations for veracity: the fact that the plaintiff may be a notorious liar or desperately short of cash, and the defendant a person of well-known probity or immense wealth, does not lead to a similar shift of the burden of proof in such cases; even though these facts, too, can have a definite bearing on who is likely to be telling the truth in such cases, and may in some instances arguably even have a greater bearing than the denial, which may sometimes be due to carelessness or forgetfulness rather than deceptive intent. Thus, even where presumptions rely on and reinforce pre-existing empirical probabilities, they entail normative judgments as to which probabilities deserve such special reinforcement; and this reinforcement goes beyond merely highlighting the empirical force of certain probabilities by giving them the effect of shifting the burden of proof, while disregarding the potential countervailing probability implications of other circumstances.

Moreover, in several cases legal presumptions are clearly not, or at least not clearly based on empirical probabilities. This is the case especially in situations where the sequence of deaths is at issue in situations where no clear proof is available. Thus in a case where a mother and her one-year-old child die in a shipwreck and her husband will receive her entire dowry if the child survived the mother, and only part of the dowry if the child died before the mother, it is to be presumed that the infant died earlier, so that the husband receives only part of the dowry (D. 23.4.26 pr.). In this passage it is claimed that this decision was made because "it was more likely (*verisimilius*) that the infant died before its mother," but there is really no clear empirical evidence for the contention that children die before adults in disasters⁴. And in another passage where a woman died in a shipwreck along with her son who had attained puberty, the reason given for the presumption that the son died *after* the mother is not that this is more likely, but that it is *humanius* (D. 34.5.22), which may be translated as "more generous." The question is of course for whom this is more generous, and the answer is that this assumption allows for the son to inherit from the mother and thus for more of her estate to remain in her husband's family upon the son's death, which would be regarded as an

appropriate outcome in the normal course of events. While in the other case the wife's family receives the benefit of the doubt because the apparent purpose of the arrangement passing on her entire dowry to the husband was to provide for her child, a purpose that can no longer be served once the child is dead.

That presumptions are often a vehicle for promoting a desirable policy rather more than aiming at decisions based on factually accurate findings becomes especially apparent in cases involving the freeing of slaves, where doubts are not infrequently resolved by the law in favor of liberty. In one passage in the *Digest*, the burden of proving that the testator did not intend to free a slave is imposed on the heirs in cases when there is "a presumption that liberty appears to have been conferred" because the words of the will can be interpreted that way, even if other interpretations are possible as well (D. 40.5.24.8). This legislative intent to favor liberty by means of presumptions is even clearer when it is established that in cases where a female slave is to be freed if her firstborn child is male, she then bears twins one of whom is male, and it cannot be established whether the boy was born first, it is to be presumed that he was, because "the more humane view should be adopted whereby the slave obtains her freedom and her daughter the status of being freeborn on the presumption that the male child was the firstborn" (D. 34.5.10.1).

The intent to promote appropriate policy rather than accurate fact-finding by means of presumptions is most apparent in cases where presumptions are irrebuttable, where proof contrary to what is presumed is not allowed. It is doubtful to what extent the Roman law of the *Corpus Iuris* established such irrebuttable presumptions (Motzenbäcker 1958: 26ff.). In one passage in the *Code*, the fact that a man and woman who were suspected of adultery later start living together or marry is treated as tantamount to a confession of adultery, leading to their punishment for that crime; the possibility of a contrary proof in their defense is not mentioned, but this could be due to the great unlikelihood that such a proof of the negative could ever be offered, rather than to the fact that such a proof is legally foreclosed (Motzenbäcker 1958: 28f.). But I think that the legal provision with which this brief discussion of

presumptions in the Roman law began should also be considered in this context. When Scaevola gives a married woman who has property of uncertain origin the benefit of the doubt by holding that "when it is not clear where the property has come from, it is more correct and decent (*verius et honestius*) to hold that she got it from her husband or someone in his power," and Pomponius explains this by saying that "Quintus Mucius appears to have taken this view in order to avoid any disgraceful inquiry involving a wife" (D. 24.1.51), it appears that in the absence of clear proof already in the possession of the plaintiff who claims that the property did not come from the husband, further investigations are not to be permitted in order to prevent "disgraceful inquiry" (*turpis quaestus*) even if this might after all prove the plaintiff's claim. So in the absence of readily available proof to the contrary, the wife's claim to her

reputation is evidently valued more highly than the plaintiff's financial interests, regardless of what the actual facts might prove to be upon closer inspection: what is more decent (*honestius*) is even more important than what is more correct (*verius*).

At this point we can conclude our brief survey of the use of presumptions in the Roman law by highlighting two points:

(1) While presumptions typically are introduced in cases of factual uncertainties, these uncertainties are often used to achieve outcomes promoting certain policies rather more than to resolve each situation in favor of the empirically more probable assumption; normative appropriateness is thus often elevated over empirical correctness.

(2) Even where the argument for the normative appropriateness of the favored outcome is not explicitly made, it is important that the person who has to decide the case be persuaded that this normative evaluation of the outcome is right, or at least not completely unacceptable, since the presumption can often easily be undercut by denying that the uncertainty which gives rise to the presumption actually exists. To take the example just discussed, the judge can accept a weak proof of the claim that the property did not come from the husband, and thus avoid the presumption in favor of the wife. Another possibility would be that the judge could interpret the rule to apply only to a woman of completely unblemished reputation, and then accept proof of some blemish making the presumption inapplicable. The procedural shift of the burden of proof to one party in such cases is thus not always completely effective in avoiding that an at least implicit substantive evaluation of the claim of the other party favored by the presumption may have an influence on the outcome. The distinction between rhetorical and legal presumptions is thus not as clear-cut as it might initially seem.

III

While the rhetorical vicissitudes of presumptions remain at least partially submerged in the Roman law of Antiquity, its revival in the Middle Ages, beginning at the turn from the eleventh to the twelfth century, brightly highlights their multifarious argumentative uses. As a particularly clear example of this explicit rhetoricization of presumptions I will briefly discuss the second edition of the *Libellus Pylei Disputatorius*, written by Pilius⁵ of Medicina, probably in the final decade of the twelfth century⁶. The starting-point for Pilius' discussion of presumptions in the first book of this work⁷ is the realization that in legal scholastic disputations as well as in the trials for which these largely serve as a preparation, it is often necessary to deal with doubts about uncertain matters⁸. In such situations, presumptions serve as a kind of incomplete proof; they provide, by means of extrinsic signs, credence or confirmation for a doubtful matter (LPD 36r)⁹. This characterization of presumptions is close to Cicero's definition of the concept of "argument," much relied upon throughout the Middle Ages, in his *Topica*: an argument is a course of reasoning which provides

confirmation for a doubtful matter¹⁰. So according to this conception, a presumption is a kind of argument whose distinguishing characteristic it is that it takes as its starting-point an extrinsic sign for a matter which cannot be established more directly, particularly by means of witnesses. Once such more direct proof becomes available, the presumption is destroyed, unless the law excludes such contrary proof; this corresponds to the modern legal distinction between rebuttable and irrebuttable presumptions¹¹. But Pilius' conception is broader than the modern legal notion of presumption, since it opens for his discussion the entire range of inartistic proofs, not merely of facts, but also of the legal characterization of actions as permissible or impermissible, justifiable or unjustifiable, excusable or inexcusable. This broadening is made possible by Pilius' linkage of proof (*probatio*) with argumentation (*argumentum*) by way of the definitions just cited. What still keeps presumptions in this sense linked with the modern conception is the fact that they have *normative* force: presumptions are not merely assumptions which people hold *de facto*, but premises on which one is entitled to rely *de iure*.

In accordance with the broad scope of his conception of presumptions, Pilius chooses for his treatment a conceptual scheme which is clearly rooted in the rhetorical theory of the *status rationales*; this scheme, which he probably derived from a work on canon law, the *Summa* of Sicard of Cremona, which had been published a few years earlier¹², uses two basic distinctions: first that between extrinsic and intrinsic facts; extrinsic facts extend from observable actions to questions of intentionality and negligence;¹³ the category of intrinsic facts includes in Pilius' view matters such as a person's specific intentions or consent, or the interpretation of the law or of a written document¹⁴. After this first basic distinction, the second leads us directly to the *status rationales*: it differentiates between doubts about the substance¹⁵ and the quality of a fact; the former concerns the question whether something was done or not, the latter the question whether it is good or bad (LPD 36v)¹⁶. These are precisely the questions which characterize the rhetorical *status* of *coniectura* (matters of fact) and *qualitas* (matters of quality); the status of *definitio* (matters of definition) is no longer part of the scheme, since its presence was based on a distinction between the legal and the extra-legal characterization of actions, which has no place in a fully-developed and professionalized legal system where *all* aspects of the judicial evaluation of an act are seen as subject to *law*, which incorporates *both* specific written legal rules and general principles of law and equity¹⁷.

Within the issue of the *substance* of extrinsic facts, equivalent to the rhetorical issue of *coniectura*, the scheme used by Pilius further distinguishes a number of topics (LPD 36v f.). His predecessors even use the term *locus*, familiar from the tradition of rhetoric and dialectic, while Pilius uses the term *modus*, which was generally applied to types of arguments in the work of the glossators. These places or modes of presuming are readily recognizable as in large part derived from the rhetorical topics of the person and the act. Thus we find here references to the person of the agent and the person with whom the agent

interacts, to time, place, and mode of action, to the habits, associates, age and necessities of the agent, to subsequent actions, indications, and rumors concerning the act; to these Pilius adds a number of general considerations affecting the evaluation of an act rather more than the question whether it did in fact occur (LPD 37r);¹⁸ this, too, has a precedent in the topics of the consequences of the act in rhetorical theory.¹⁹

The rhetorical topics of the person and the act are also the main source for the classification of modes of arguing about the *quality* of extrinsic facts in Pilius' scheme (LPD 37r ff.). The applicability of these topics to the issue of quality as well as to the issue of conjecture is implied by the fact that in classical rhetorical theory they had been introduced as components of *all* proof; but their presence in the evaluation as well as in the ascertainment of facts is actually brought out more clearly here in Pilius' work than in rhetorical handbooks such as Cicero's *De inventione*, which was one of the main texts used for rhetorical instruction in that period. Again Pilius adds to the scheme of his canon law predecessors some further modes which he has found emphasized in his Roman law sources (LPD 38v f.; Lang 1942: 130. And he greatly expands the category *ex causa* (from the case), under which he includes a large number of special circumstances and case types (LPD 39r ff.); here we also find some modes of presuming related to Cicero's more dialectically oriented topics *adiuncta negotio* (LPD 40v ff.), such as genus and species (LPD 40v), the greater and the lesser (LPD 43v), and part and whole (LPD 48v f.).²⁰

What distinguishes Pilius' treatment of these topics from that in the rhetorical handbooks, apart from additions to and adaptations of modes of presuming derived from a much expanded body of technical law, is the source from which the probabilities invoked derive their probative force. In the classical tradition of rhetoric it was the common sense of the community, a view of how the world worked and should work, premises posited by the orator as shared between him and the deciding audience, which undergirded the artistic arguments of the rhetor. But now, in a more technically complex and increasingly professionalized legal system, the lawyer's argumentative art focuses on the law as the primary foundation of forensic arguments. In order to establish that the legal advocate is entitled to rely on certain presumptions, Pilius supports every topic he introduces with often copious references to his legal sources, citing primarily the *Corpus Iuris*.

Pilius' audience consists of professional jurists, who are expected to find the modes of presuming persuasive because they are authoritatively supported, not because they recognize in the advocates' assumptions their own. But that contrast should not be overstated: On the one hand, the juristic sources themselves are to a considerable extent a codification of common sense; and on the other, as Pilius' treatment of these arguments shows very clearly, the authorities cited do not completely determine either the advocate's argument or the judge's decision. And what links the ancient rhetor and the medieval jurist is the search, among the premises endorsed as persuasive or even recognized as binding by the audience, for arguments which can support both

sides in a controversial case.

Pilius provides a systematic presentation of authoritative sources for arguments supporting as well as opposing contentions such as: that a certain act has been or will be committed or not committed; that the act was permissible or impermissible; that intent or negligence were or were not present; that the agent did or did not have certain intentions, did or did not know certain things; that such knowledge or ignorance does or does not have legal significance; that consent was or was not given; that laws or declarations should be interpreted broadly or narrowly; that an act should or should not be regarded as aggravated or excused or mitigated by circumstances; that someone should or should not be punished for the actions of another, etc., etc. The opposition between the principles invoked for and against such contentions is not treated primarily as posing a theoretical problem which calls for a resolution, but as an opportunity for finding arguments for and against the propositions in question. Which of these arguments to use is in effect left to the judgment of the advocate, which to accept to the discretion of the judge.

We can now end this brief look at an example of the medieval legal uses of presumptions by also noting two points:

(1) For Pilius, legal presumptions are not monolithic rules that unequivocally determine in advance in every case which side in a dispute has a unitary presumption in its favor.

(2) Instead, his discussion emphasizes that in controversial cases a variety of presumptions tend to be available to both sides, and that the outcome depends on which of the arguments presented persuade the judging audience.

IV

In conclusion, I will sketch rather than fully discuss two ways in which this highly compressed historical survey of the development of legal presumptions impinges on contemporary discussions of the function of presumptions in argumentation.

First, I would like to suggest that the treatment of presumptions in Pilius' *Libellus Disputatorius* shows that the supposedly "legal" conception which traditional textbook treatments of presumptions have associated with Whately is not only questionably attributed to that author,²¹ but that it is not even an adequate representation of the way presumptions operate in the law. Legal presumptions do not constitute (1) "a unitary advantage that is objectively assigned by rules [...] to the side that upholds the *status quo*," and they do not require (2) "that all affirmative argument be encumbered by a corollary burden of proof such that the affirmative must amass a preponderance of evidence [...] on all crucial issues."²² Legal presumptions as discussed by Pilius rather approximate the psychological notion of presumption ascribed to Whately by Michael Sproule, a conception constructing presumption "as consisting of (1) a

potentially great number of argumentative advantages, which (2) may be simultaneously conferred on both sides of dispute;" and even if they do not result, as do such psychological preferences, from "audience preferences for particular arguments or sources of information,"²³ but rather on authoritative legal pronouncements, such preferences will still have an important influence on the interpretation and acceptance of presumptions by the judging audience. Admittedly Pilius is more forthright than many more recent writers on legal presumptions in highlighting the rhetorical openness inherent in legal argumentation, but this is increasingly being acknowledged in contemporary literature on the subject as well.²⁴

At the same time I think that this proximity of the "psychological" burden of proof to legal presumptions should also encourage us to look more closely for the normative as well as empirical elements entering into audiences' constructions of their presumptions, as well as into speakers' constructions of these same audience presumptions.

Finally, our look at the role of presumptions in the Roman law of the *Corpus Iuris* suggests that Gaskin's discussion of the rhetorical uses of burdens of proof in modern discourse (Gaskins 1992) points to argumentative procedures that can already be found in ancient law. But this comparison also suggests that the masking of substantive considerations behind the procedural shift of the burden of proof (Gaskins 1992: 47ff., 75 ff.) can perhaps not be quite as rhetorically effective as Gaskins appears to assume; the substance behind the procedure must still be persuasive if the shift of the burden of proof is to be effective.

A good example of this is actually provided by the school desegregation cases that Gaskins discusses extensively (Gaskins 1992: 54ff.) After *Brown v. Board of Education* (347 U.S. 483 [1954]), which avoided a formal overruling of the "separate but equal" doctrine²⁵ by purporting to find that segregated schools simply could not be both separate and equal, some courts in the South took this apparent shift in the burden of proof at face value and heard and accepted factual evidence that schools could in fact be equal through segregated²⁶. Defenders of the United States Supreme Court's decision shifted from matters of *factual* proof to an emphasis on the *moral* unacceptability of segregation,²⁷ and the Court itself finally made the openly *legal* pronouncement that it is "no longer open to question that a State may not constitutionally require segregation of public facilities."²⁸ What this may suggest is that in every case in which a reliance on the burden of proof is central to the openly declared argument, the audience of the Court must still be able to recognize and willing to be persuaded by an underlying substantive argument, based on the consequences achieved and the values served by this shift, if this rhetorical strategy is to work.

ENDNOTES

1On the creation of the (later so-called) *Corpus Iuris* in the sixth century A.D. see Kunkel 1973: 163ff.; the other parts of the *Corpus Iuris* are the *Institutes*, a brief basic introduction to the law for students, the *Code*, a collection of imperial legal pronouncements of the emperors before Justinian, and the *Novellae*, legal provisions created by Justinian himself.

2Cf. a similar thought already expressed in Antiphon's *On the Murder of Herodes* (91): the defendant urges the jury to give him the benefit of the doubt with the words "If, then, you must make any mistake, it would be less of an outrage to acquit me undeservedly than to condemn me without just cause; for the former is only a mistake, while the latter is also an eternal disgrace." Such passages show that the idea of the presumption of innocence is not a creation of the Common Law.

3This could occur for instance if a cash payment is witnessed, but the transfer of goods for which the cash constitutes the payment was not witnessed.

4The same presumption is expressed more generally also in D. 34.5.23.

5In the sources, the name is also spelled Pillius, Pylus, Pyleus, Pileus, etc.; the spelling Pilius appears in one document in his own hand: see Adversi 1960: 8; and this spelling is also preferred in a major handbook on the legal literature of the period: see Weimar 1973: 238f.

6The work is not yet available in a printed edition; the most reliable text is given by a manuscript from the fourteenth century, located in the Austrian National Library in Vienna (cod. Vindob. 2157 fol. 36r-87v); the first book has been edited from that text, with consultation of another manuscript in the Chapter Library at Olmouce (Czech Republic) in Meyer-Nelthropp 1959. I have worked with that edition and with a microfilm of the Vienna manuscript, which I have also been able to study in the Österreichische Nationalbibliothek. For discussions of the work see Genzmer 1934: 426ff.; Kuttner 1951: 772ff.; Motzenbäcker 1958: 62ff.; Adversi 1960: 30f.; Santini 1979: 261ff. On Pilius' life see Adversi 1960: 7-18; Clarence-Smith 1975: 30f.; Santini 1979: 161ff. The following discussion of Pilius' *Libellus Disputatorius* is adapted from a longer paper I have written on "Rhetoric in Medieval Legal Education: *Libellus Pylei Disputatorius*."

7This book will hereinafter be referred to as LPD, and passages from this work will be cited by fol. number from the Vienna manuscript (cod. Vindob. 2157 fol. 36r-87v).

8On the disputations in the medieval faculties of law see Fransen 1985: 223ff.

9Presumpcio est rei de qua queritur semiplena probatio vel rei dubie aliquibus signis extrinsecis credulitas seu fides. (I have retained the orthography of the Ms.)

10Cicero, *Topica* 2.8: Itaque licet definire [...] argumentum [...] rationem quae

rei dubiae faciat fidem.

11See, e.g. McCormick 1972: 802ff.

12Lang 1940: 122ff. thinks that Pilius may have encountered this work not directly, but through an anonymous work on canon law now usually referred to as the *Tractatus de praesumptionibus* (Lang prefers the title *Perpendicularum*), which he feels apparently relied on and somewhat modified Sicard's treatment of presumptions; see also Lang 1942: 109ff. But Motzenbäcker 1958: 93ff. (n. 1) argues that Sicard's is the later work.

13This becomes clear at LPD 51r ff.

14Lang 1942 overlooks that Pilius, in this respect not following Sicard or the *Perpendicularum*, here treats matters of interpretation as a subcategory of questions of intrinsic fact, rather than as a separate category; therefore he has not announced a third category and then failed to address it, as Lang 1942: 134 charges. Because Pilius does treat the category of intrinsic facts (LPD 55r ff.), however without marking the subdivisions of substance and quality here, whose usefulness in this context had already been doubted in the *Perpendicularum* (Lang 1942: 133); but he does observe the subdivision into matters of intention or consent (55r ff.; including matters of knowledge and ignorance of fact or law [55v f.], the question whether ignorance excuses [56r ff.], and issues of the significance of the knowledge and consent of others [57r f.] and of subsequent approval [58r f.]), and also addresses matters of broad and strict interpretation (especially 59r ff.), here focused on private declarations rather than laws. Questions of the strict or equitable interpretation of the law are addressed at 53v, and issues of ambiguity in written documents at 54r, thus *before* the section on intrinsic facts, which begins at 55r; so Lang is right insofar as he notes some structural inconsistency in Pilius' treatment of interpretation.

15Or essence; Pilius uses these terms interchangeably.

16Quibus modis presumatur. variis modis contingit. presumi siquidem incertitudo quandoque vertitur circa factum extrinsecum. puta cum de voluntate vel consensu cuiusque queritur vel de iuris seu alicuius scripture interpretatione. Item quandoque dubitatur de facti substantia. sitne aliquid factum vel non. quandoque essentia certa constituta de eius qualitate disputatur. scilicet sitne bonum vel malum quod factum deprehenditur.

17That *qualitas* was the domain of the jurists is already recognized in Cicero's *De inventione* (1.11.14). He assigned to the *iuris consulti*, within the *constitutio generalis* (his term here for the *status qualitatis*), the *constitutio negotialis*, which is concerned with "what the law is according to civic custom and equity;" his oratorical practice, e.g. in the *Pro Caecina* (65ff.), shows that they were also concerned with the interpretation of the written law and of legal documents; and eventually they also addressed questions which Cicero

assigns to the other part of the *constitutio generalis*, the *constitutio iuridicalis*, whose name already signals its link with matters of law.

18These are not to be found in Sicardus' *Summa* and the *Perpendiculum*; see Lang 1942: 128f.

19For the *consecutio negotii* see, e.g., Cicero, *De inventione* 1.28.43; for the topical theory of the attributes of the person or the act as the core of argumentative proof see *ibid.* 1.24.34ff. For a discussion of the development of that theory in Roman Antiquity see Leff 1983.

20Cf. Cicero *De inventione* 1.28.41f. on the *adiuncta negotio*; on the dialectical cast of these *topoi* see Leff 1983: 30.

21That is the central contention argued in Sproule 1976.

22These are characteristics of the "legal" conception of presumption in argumentation pointed out by Sproule 1976: 126.

23These are elements of the interpretation of Whatelian presumption offered by Sproule 1976: 115.

24For an overview see, e.g., Gaskins 1992: 15ff.

25Established in *Plessy v. Ferguson*, 163 U.S. 537 (1896).

26See, e.g., *Stell v. Savannah-Chatham County Board of Education*, 220 F.Supp. 667 (S.D.Ga. 1963); reversed 318 F.2d. 425 (5th Cir. 1963).

27See, e.g., Cahn 1955.

28*Johnson v. Virginia*, 373 U.S. 61 (1964).

REFERENCES

Adversi, Aldo (1960). *Appunti biobibliografici sul giureconsulto Pillio da Medicina*. Firenze: Sansoni.

Cahn, Edmond (1955). "Jurisprudence." *New York University Law Review* 30: 150ff.

Cicero. *De inventione*.

Cicero. *Pro Caecina*.

Cicero. *Topica*.

Clarence-Smith, J.A. (1975). *Medieval Law Teachers and Writers Civilian*

and Canonist. Ottawa: University of Ottawa Press.

Fransen, Gérard (1985). "Les questions disputées dans les facultés de droit." In *Les questions disputées et les questions quodlibétiques dans les facultés de théologie, de droit et de médecine*. Turnhout: Brepols, 223-277.

Gaskins, Richard H. (1992). *Burdens of Proof in Modern Discourse*. New Haven: Yale University Press.

Genzmer, Erich (1934). "Die iustinianische Kodifikation und die Glossatoren." In *Atti del Congresso internazionale di diritto Romano (Bologna 1933)*, Vol. I. Pavia: Successori Fratelli Fusi, 345-430,

Kunkel, Wolfgang (1973). *An Introduction to Roman Legal and Constitutional History*, tr. J.M. Kelly, 2d ed. Oxford: Clarendon Press.

Kuttner, Stephan (1951). "Réflexions sur les Brocards des Glossateurs." In *Mélanges Joseph de Ghellinck*, Vol. II. Gembloux: Duculot, 767-792.

Lang, Albert (1940). "Rhetorische Einflüsse auf die Behandlung des Prozesses in der Kanonistik des 12. Jahrhunderts." In *Festschrift für Eduard Eichmann zum 70. Geburtstag*. Paderborn: Schöningh, 69-97.

Lang, Albert (1942). "Zur Entstehungsgeschichte der Brocardasammlungen." *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Kanonistische Abteilung* 62: 106-141.

Leff, Michael C. (1983). "The Topics of Argumentative Invention in Latin Rhetorical Theory from Cicero to Boethius." *Rhetorica* 1: 23-44.

Meyer-Nelthropp, Jürgen (1959). *Libellus Pylei Disputatorius Liber Primus*. Dissertation: Universität Hamburg.

McCormick (1972). *McCormick on Evidence*. Edward W. Cleary et al. (Eds.), 2d Ed. St. Paul: West Publishing.

Motzenbäcker, Rudolf (1958). *Die Rechtsvermutung im kanonischen Recht*. München: Kommissionsverlag Karl Zink.

Quintilian. *Institutio Oratoria*.

Santini, Giovanni (1979). *Università e società nel XII secolo: Pillio da Medicina e lo studio di Modena. Tradizione e innovazione nella scuola dei Glossatori*. Modena: S.T.E.M.-Mucchi.

Sproule, J. Michael (1976). "The Psychological Burden of Proof: On the Evolutionary Development of Richard Whately's Theory of Presumption." *Communication Monographs* 1: 115-129.

Weimar, Peter (1973). "Die legistische Literatur der Glossatorenzeit," In Helmut Coing (Ed.), *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte: Mittelalter (1100-1500)*. München: Beck, 129-260.