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William Lloyd Prosser—The Myth and the Man

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I FIRST encountered both Myth and Man as a first year law student at Minnesota. The Myth was formidable indeed: "He reads as fast as Teddy Roosevelt—that's why he can't find a research assistant, no one can turn the pages fast enough for him; Bull Warren is his hero and Bill's even more ferocious; when he argues an appeal, the justices ask him how he wants the opinion phrased; he lands Marine Corps airplanes on hotel lawns, because ground transportation from the airport is too slow; he's never lost a squash game; he knows all of Shakespeare and Dickens by heart; his thirst is unquenchable and his capacity illimitable; his typing output per second is the country's highest—indeed, the world's, if you calculate on the basis of fingers used (two—one per hand); he cites—with curses—all the Yankee batting averages since 1898 (his birthyear); he can give you in sequence all of the crowned heads of Europe since Charlemagne, but he prefers to list them backwards . . ."

And the Man was equally incredible. I shall never forget how we sought in Torts to trap him in some sort or shadow of error. Perhaps he would have Mrs. Palsgraf young and demure, or the circus elephant would step forward rather than back, or he would say "libel per se" when he meant "libel per quod." Once I thought I had him on proximate cause. But the issue became moot for want of proper framing. For I made the tragic mistake of garbing my shaft of insight in a verbal flaw. After a momentary pause in the stilly classroom—actually longer than death—came the booming retort: "There's no such word as *irregardless*." (For me, that remains incontrovertibly true, even though the third edition of *Webster's* apparently allows it.)

Those were the years when *Prosser*, First Edition, was aborning. The Law Review staff might leave at midnight, but the Northern Lights—from Bill Prosser's office—gave way only to dawn. In those days I wondered whether it would really become the world's most cited text, and if so, whether he or Eleanor would deserve the most credit.

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Then came times when once again I knew only the Myth. OPA red tape was torn to shreds, and Sir Winston Churchill laughed so hard as to drop both Scotch and cigar when F.D.R. took a Prosserism to the Atlantic Conference. The Harvard student's action for conversion was still pending, and Bill Prosser still had the five dollars. And the Second Edition.

Then he invited me to Boalt. I was duly warned by all hands—as though warning were necessary for a former student. "He tells the Corporations teacher that all we need now is a good Corporations man; the Taxation professor, that our biggest hiatus is in the Tax field." Thus I should have been prepared for his welcome at my first Boalt faculty meeting: "Louisell is here. All we need now is a good Evidence and Procedure man."

As colleague, he constantly has presented the really meaty intellectual challenges which make the problems of *res judicata*, jurisdiction, hearsay—even proximate cause itself—insubstantial by comparison. *Why* would a United States attorney engage the full panoply of federal might to charge a hunter with shooting a fawn (defined by the applicable Louisiana statute as "a deer with horns less than three inches long"), when in fact the prey had been a full grown buck with, however, only "nubbins" for horns?¹ How do *you* reconcile the cross-eyedness of Pope Alexander VI with Infallibility? *Why* do they teach psychiatric, psychologic, and sociologic nonsense in a first class law school? Which of the following verses of the Prosserian version of "The Common Law of Texas"² provides the most realistic insights into the jurisprudence of that great Republic?

They buy their bourbon by the case, and never shun the cup,
They ride around in Cadillacs, and smash each other up;
And when they litigate the case, it's the weirdest ever seen,
Because the poor benighted courts try to follow Leon Green.

It's the damnedest jurisdiction
This country ever saw,
It has the queerest people,
The most peculiar law.

¹ *United States v. Dowden*, 139 F. Supp. 781-82 (D. La. 1956) (Dawkins, C.J.):

A tiny tempest in a tinier teapot has brought forth here all the ponderous powers of the Federal Government, mounted on a Clydesdale in hot pursuit of a private citizen who shot a full-grown deer in a National Forest.

Not content with embarrassing defendant by this prosecution . . . the Government has compounded calumny by calling the poor dead creature a "fawn." Otherwise fully equipped with all the accouterments of virile masculinity, the deceased, alas, was a "muley." Unlike other young bucks, who could proudly preen their points in the forest glades or the open meadows, this poor fellow was foredoomed to hide his head in shame: by some queer quirk of Nature's caprice, he had no horns, only "nubbins," less than an inch in length.

² LAW SCHOOL ASSOCIATION LYRICS (Prosser ed. 1962); 2 *The Writ* No. 6, at 4, April 1961.

They have some nuts in Ioway,
And some in Tennessee,
But the common law of Texas is
A thing of mysteree.

They enter into arguments, and then they have a fight,
They call each other dirty names, and brood on it all night,
They lie in wait for sixteen hours behind an old rail fence,
And shoot the fellow in the back, but it's all in self-defense.

It's the damnedest jurisdiction
This country ever knew,
And all its jurisprudence
Is twisted like a screw.
Connecticut's a crazy place,
And so is Arkansasaw,
But Texas has, of all the states,
The most peculiar law.

They raise an oil well derrick in the city hall front yard,
And when the damn thing blows to hell they take it mighty hard.
Petroleum and rocks and mud are strewn all o'er the sod,
It makes a most unsightly mess, but it's just an act of God.

It's the damnedest jurisdiction
This country ever had,
It has ten thousand cases,
And all of them are bad.
Oh, Minnesota's off the beam,
And so is Idaho,
But Texas has the wildest law
Upon this earth below.

A widow seeks indemnity upon a policee,
And she recovers double, with her attorney's fee,
For when she loaded arsenic into her husband's beans,
The late lamented met his death by accidental means.

It's the damnedest jurisdiction
There is from coast to coast,
There's crazy law all over,
But Texas has the most.
They've lunatics in Michigan,
Also in Delaware,
But the common law of Texas
Will really curl your hair.

A loyal son of Texas goes out upon a spree,
And perpetrates six murders, some rape and burglary;
He ends upon the gallows—it's a proper end, of course—
But the reason that they hang him is, the bastard stole a horse.

It's the damnedest jurisdiction
In the entire U.S.A.,
And what will happen next there
No man alive can say.
They do strange things in Maryland,
Likewise in Oregon,
But Texas has the wildest law
That e're the sun shone on.

They ask the jury questions, which may number twenty score,
Instructions that they give them take seven days or more,
And when the case comes on appeal the record grows and grows,
And what the last opinion holds, alas, God only knows.

It's the damnedest jurisdiction
Upon this planet sad,
Its whole judicial process
Is absolutely mad.
There's schizophrenia in New York,
Also in Illinois,
But the common law of Texas is
A psychiatric joy.

And now, as he and Eleanor leave for the next of four teaching careers—Minnesota, Harvard, Boalt, and Hastings (not to mention practice and the thirteen-years Deanship), the Myth and the Man for me merge into one grand unity. "Full aid" insurance may engulf the world, until the law of Torts is only of happy memory; administrative agencies may have life so orderly that no longer will one so much as dream of wrongful conduct; arbitration may make litigation as obsolete as Secretary McNamara considers the bomber; the electronic computer may render legal research as anachronistic as chariot racing; automation may almost replace the utility of homo sapiens himself. But as long as Bill Prosser, Man or Myth, bestrides the earth, there will be something left of individualism, hard work and hard thinking, honor, and human friendship.