Jurisprudence, law and certainty in Francis Bacon

Silvia Manzo
Universidad Nacional de La Plata – CONICET

Introduction

With different nuances and from diverse analyses, scholars agree to maintain that the interaction of law and natural philosophy contributed to originate distinctive conceptual categories such as facts, certainty, and probability during the early-modern period.¹ From this historiographical account, Francis Bacon² has been highlighted as one of the most influential authors who merged legal thinking with natural science. His idea of natural history and his project of reform of natural philosophy are undoubtedly permeated with legal overtones. Bacon was both an active professional jurist, engaged in the legal debates of the day, and a philosopher, deeply committed to the renovation of natural philosophy. Although this conjunction of Bacon as a jurist and Bacon as a natural philosopher has attracted the attention of several scholars,³ relatively little has been said about the concrete ways in which Bacon’s


legal training might have inspired particular epistemic notions involved in his scientific program.

In order to understand how legal thinking actually affected Bacon’s scientific program, it would be necessary firstly to elucidate the epistemic categories evolved in his legal thinking and the practices connected to them, particularly those relevant to natural philosophy and natural history. One of those categories was certainty. Legal certainty is implicated at least in two momentous issues of early-modern jurisprudence: 1) the certainty of law – concerning the clear meaning and the interpretation of laws; 2) the certainty concerning facts – regarding the establishing of legal facts. A historical study of early-modern legal certainty and uncertainty, therefore, should focus on laws as well as on facts. Although Bacon was conversant with these two dimensions of legal certainty, dealt often with them and was deeply involved in problems arisen from them, he neither defined nor described the kind of certainty typical of laws and facts. His elusive notions of certainty have to be traced through his large legal theoretical corpus and his multiple interventions in legal cases.

The aim of this paper is to find out the notions of certainty assumed in Bacon’s jurisprudence. Accordingly, the first part of the paper deals with the concept of the certainty of the law entailed in Bacon’s law reform project, and exhibits his attempts to make law certain. The second part of the paper provides a survey of Bacon’s perspectives on the certainty concerning facts and looks for its vestiges in his practices as a lawyer. In doing so, I try to answer the following questions: Are laws and facts thought to be “certain” in the same sense? What are the practices laying behind the notion(s) of legal certainty? What I want to do here is to share with you the first results of a wider research which aims to answer more general questions like “do Bacon’s notions of legal certainty have any continuity with the kinds of certainty assumed in his natural history (facts) and his natural philosophy (laws)?”

I. Certainty and laws

The certainty of laws and interpretation

The certainty of laws has been an ideal of jurisprudence from the Justinian age to the present. In the Roman law tradition certainty was conceived of as a perfection of the law and a warrant of justice. It opposed to the original uncertainty of law, characteristic of primitive stages of societies in which human affairs were dominated by unstable laws and exempted from a fixed legal system. A certain law was thought to be a clear and unambiguous law. On the contrary, an uncertain law was conceived of as a dubious law, whose meaning was obscure and equivocal. In this context, that a law is uncertain means that there are doubts about the meanings of its words.4

Strongly related to the question of certainty were the discussions on the interpretation of the law. In Renaissance jurisprudence interpretation was understood as an act of making certain the meaning of law, which might be done only by the legislator, the judge, or the jurist. “To interpret” was standardly defined in legal lexica as “to explain an obscure and ambiguous thing”. Legal interpretation was compared to the act of translation by which the meaning of the words of an unknown language becomes understandable through the words of a known language.\(^5\) As a wide and complex phenomenon, interpretation involved the resolution of ambiguities, the determination of a speaker’s or writer’s intention, and the nature of objective meaning.\(^6\)

In the Roman law tradition equity (aequitas) served as fundamental criterion for interpreting the law, since equity was thought to be the immutable and eternal source of the positive laws. Equity was a principle of superior justice intimately connected with natural law. It was identified with “natural reason”, the reason that dictates natural law and from which positive laws derive. The Roman law tradition emphasized that, being effects of reason and equity, positive norms were permeated with rationality. Juridical norms express concretely and imperfectly the dictations of reason. Consequently, legal interpretation must rely on equity and reason in order to preserve the genuine meaning of the laws.\(^7\) Being the law an imperfect text, legal interpretation was a particular form of mediation and clarification which became unavoidable, to the extent that an absolutely certain and totally unambiguous law was assumed as an unachievable ideal. At the same time, interpretation added the risk of misrepresentation of the right meaning of law. Actually laws displayed different degrees of certainty and, as a consequence, they belonged to probable knowledge.\(^8\)

By the sixteenth century, jurists both of civil and common law traditions were deeply worried about the inconveniences of legal uncertainty. Numerous projects were devoted to systematize and rationalize the laws, in order to afford an effective remedy to uncertainty.\(^9\) Law reform projects, however, were somewhat condemned to be a failure due to the very conditions of the undertaking: they searched for a completely certain, unambiguous and explicit law but, at the same time, they assumed that interpretation was an ever necessary supplement of law. This situation somehow evinces traces of the longstanding debate about the epistemic status of jurisprudence: the question whether jurisprudence is an art or a science. Some jurists thought that “ideally” the science of law is apodictic, but in reality, they concede, it is no more than probable.\(^10\)

Bacon shared the worry of his contemporaries and looked for the elimination of the uncertainty, which, as he claimed, prevailed in the English common law. Moreover, the certainty of the law constituted one of the substantive goals of his law reform project, which


\(^7\) Piano Mortari (1956), ch. 2.


was a primary and permanent concern of his public agenda from the Elizabethan period down to his political fall in 1621.\footnote{11} As early as 1594, Bacon evinced his interest for the certainty of the law in *Gesta Grayorum*, a mask played at Gray’s Inn. One of the characters written by Bacon advised the fictional “Prince of Purpoole”: “purge out the multiplicity of Laws, clear the uncertainty of them, repeal those that are snaring, and prize the execution of those that are wholesome and necessary.”\footnote{12} Some years later, in *A Collection of Some Principal Rules and Maxims of the Common Laws* (one of Bacon’s main legal treatises, composed by 1596 and published posthumously in 1630), the dedicatory epistle to the Queen proposed “to enter into a general amendment of the states of your laws, and to reduce them to more brevity and certainty”. He was convinced that the uncertainty of the law was “the principal and most just challenge” to the English law. \footnote{13} A well digested and certain law would have multiple beneficial effects on the administration of justice.\footnote{14}

Bacon gave his most detailed and explicit views on the certainty of the law in *Exemplum Tractatus de Justitia Universalii, sive de Fontibus Juris, in uno titulo, per Aphorismos*. Published in 1623, the *Tractatus* is part of the Book Eight (on the science of civil government) of *De Augmentis Scientiarum*.\footnote{15} The text, designed as an example of legal treatise, provides only the first Title of the *Tractatus* and focuses thoroughly on the certainty of the law. Unfinished as it is, and unusually systematic when compared to the rest of Bacon’s writings, the *Tractatus* displays the mature work of the mind of a genuine jurist. It gathers key points of Bacon’s long-standing reflections on law reform, evincing the mastery of his legal prose and the wide scope of his project. Given the relevance of this work for the subject of this paper, I will expound a summary of its structure and content.\footnote{16}

The *Tractatus* begins by establishing four conditions that a law must meet to be considered good [bona lex]: it must be certain in its exposition, just in its norm, easy to execute, consonant with the political system, and it must stimulate virtue in the subjects.\footnote{17}


\footnote{12} *Gesta Grayorum*, SEH, VIII, 339-340. For an insightful analysis of Bacon’s intentions in this piece, see Neustadt (1987) pp. 75-77.

\footnote{13} *Maxims*, SEH, VII, 319.

\footnote{14} *A Collection of Some Principal Rules and Maxims of the Common Laws* [hereafter *Maxims*] SEH, VII, 316: “the great hollowness and unsafety in assurances of lands and goods may be strengthened, the swarving penalties that lie upon many subjects removed, the execution of many profitable laws revived, the judge better directed in his sentence, the counsellor better warranted in his counsaile, the student eased in his reading, the contentious suitor that seeketh but vexation disarmed, and the honest suitor that seeketh but to obtain his right, relieved”.

\footnote{15} Hereafter *Tractatus*. *De Augmentis Scientiarum*, SEH, I, 803-827.


\footnote{17} *Tractatus*, SHE, I, 805, aph. 7: “Bonam legem censeri possit intimatione certa, praeccepto justa, executione commoda, cum forma politiae congrua, et generans virtutem in subditis.” (all italics are in the original, unless otherwise specified).
Being the first “dignity of the laws”, certainty is a necessary condition for justice, to the extent a law cannot be just if it is uncertain. On the other hand, certainty and interpretation somehow counterbalanced as two opposites of a semantic continuum: more certitudo entails less interpretatio, and vice versa. Certainty allows for the best law possible, that is to say, the law that by no means requires interpretation.

The rest of the Tractatus deals with the kinds of uncertainty, their causes and remedies. As a general claim, Bacon contended that since the English law “is no text law” but a succession of judicial acts collected in Year Books or Reports, “as these Reports are more or less perfect, so the Law itself is more or less certain, and indeed better or worse.” Laws can be uncertain in two ways: (1) when there is no law covering a particular case; or (2) when a law is ambiguous or obscure. The lacunae of law stem from the limits of human reason, which is unable to prescribe all at once the laws embracing every possible human event. That shortcoming can be repaired by four means: i) by deducing [deducenda] the lacking law from similar laws (aph. 11-20); ii) by using examples from which a new rule of justice can be asked [petenda] (ap 21-31); iii) by instituting special courts: the praetorial court (a court of equity, like the English Court of Chancery) and the censorial court (a court with extraordinary discretion in criminal matters, like the English Star Chamber) (aph. 41-46). As a remarkable guideline, Bacon argued that it was “of the greatest importance to the certainty of the law” that the praetorial courts “be not allowed to swell and overflow”, since otherwise everything might become “a matter of discretion” (aph. 43). Finally, Bacon introduced a further way to fill legal lacunae: iv) by merging pre-existent laws (aph. 47-51).

The uncertainty arisen from the obscurity of laws is explained, again, as effect of four causes: i) excessive accumulation of laws, especially when mixed with obsolete laws; ii) ambiguous, neither clear nor perspicuous, laws; iii) inattentive and disordered methods of exposition; iv) contradictions or inconsistencies among judgments. To put right the excessive accumulation, Bacon urged to examine the legal corpus periodically, to compose a new statute (aph. 53-58) and to arrange a digest of laws, inspired in the Justinian model (aph. 59-61).

The ambiguity of laws (aph. 65-71) stems from verbosity, the conciseness, or the inconsistency between the preamble and the body of the law. The ideal law wording lies in a middle term between verbosity and excessive brevity. Ordinary laws that people usually interpret by their own means and without lawyer’s counsels must be clearly indicated as if were with a finger. Verbosity has undesired effects, and actually does not preserve the true intention of the law “for while it tries to enumerate and express every particular case in apposite and appropriate words, expecting greater certainty thereby, it does in fact raise a number of questions about words”. The “safer and truer” kind of interpretation “proceeds

\[18\] Tractatus, SEH, I, 805: “Titulus: De prima dignitate legum, ut sit certa”.

\[19\] Ib.: “legis tantum interest ut certa sit, ut absque hoc nec justa esse possit.” Cudleigh’s Case, SEH, VII, 635Cf: “it is a good principle, in obscuris quod minimum est sequamur. Let the law be guide so far as possibly it can be, and make the fewest questions; nam quod certum non est justum non est.”

\[20\] “Si incertam det lex, quis se parabit ad parenund? Etiam illi recte posuit est, optima esse legem, quae minimum reliquit arbitrio judicis id quod certitudo praestat”, Tractatus, SHE, I, 805. Cf. ib. p. 813, aph. 46: “optima esse legem, quae minimum reliquit arbitrio judicis, optimus judex qui minimum sibi”.

\[21\] A Memorial touching the review of Penal Laws and the Amendment of the Common Law (1614), SEH, XII, 85.

\[22\] The ways i) and ii) are similar to the “analogical extension” practiced in Roman law and are supported on a principle of equity: “ubi est eadem ratio ibi eadem ius”. See Piano Mortari (1956) p. 31 and Maclean (1992) pp. 116-124.
according to the sense of the law.”\(^{23}\) As for preambles, when used properly, they can serve to reveal the “intent and sense” of the law.\(^ {24}\)

A large part of the *Tractatus* (aph. 72 to 93) addresses to give instructions to improve the exposition of the law by means of reports, genuine writings, auxiliary books, *responsa et consulta prudentium*, and lectures. Particular attention is given to the guidelines to prepare accurate law reports (aph. 73-76). They must record legal cases shortly and exactly, by registering the judgments word by word, by providing the reasons alleged by judges, and by ruling out authorities. Learned lawyers rather than judges should be appointed to arrange the reports. Provided that law reports are like “histories or narratives of the laws”, they must exhibit the cases chronologically. On the other hand, Bacon pointed out that the amount of genuine legal writings must be reduced to “moderate limits”, to the point that the legal corpus, which he labeled *Corpus Juris*, must just consist of the Common Law, the constitutional laws or statutes, and the law reports.

 Auxiliary books should assist the “science and practice of the law” (aph. 79-88).\(^ {25}\) Provided that they are read and used with care and prudence, auxiliary books are praised as particularly useful for legal education. Bacon admitted of six kinds of auxiliary books, some of which remind us of some parts of the Roman *Corpus Juris Civilis*: *Institutiones* (a clear and slight sketch of the laws), *De Verborum Significatione* (a law dictionary), *De Diversis Regulis Juris* (a collection of Maxims of the Laws, to which I will refer later), *Antiquitates Legum* (compilations of disused laws, which deprived of authority though, are still venerable); *Summae* (abridgments of the laws) and *Agendi Formulae* (arrays of forms of pleading).

### Maxims, authorities and reason

As we have seen, the book *De Diversis Regulis Juris* is included among the books auxiliary to the core sources of the legal corpus. Moreover, this book is said to contribute to the certainty of laws “more than anything else.”\(^{26}\) Bacon’s reflections on the strong connection between the *regulae juris* (also called maxims of the laws)\(^ {27}\) and the certainty of

---

24 Cf. *Reading on the Statute of Uses*, SHE, VII, 417-418: “And whereas a wise man has said, *nil ineptius lege cum prologo, jubeat non disputet*; this had been true if preambles were annexed as pleading for provisions of laws: for the law carries authority in itself: but our preambles are annexed for exposition; and this gives aim to the body of the statute; for the preamble sets up the mark. And the body of the law levels at it”. Cf. Cudleigh’s Case, SEH, VII, 625.
25 The section on auxiliary books has as precedent the proposal to the King in Amendments of the Laws, SEH, XIII, 69-71.
26 *Tractatus*, SEH, I, 105, aph.82.
27 The words *principles*, *maxims*, and *rules* were employed interchangeably by common lawyers. See for example Edward Coke’s comments on Littleton’s *Tenures*: “Maxim, a sure foundation or ground of art, and conclusion of reason, so called *quia maxima est cuius dignitas et certissima authoritas atque quod maxime omnibus probetur*, so sure and uncontrable as that they ought not to be questioned. And that which our author here and in other places calleth a Maxime, hereafter he calleth a Principle; and it is all one with a Rule, a common ground, Postulatum, or an Axiome, and it were too much curiositie to make nice distinctions between them”, Edward Coke, *The First Part of the Institutes of the Lawes of England, or a Commentarie upon Littleton*, second corrected edition, London: Iohn Mars, 1629 (hereafter Co. Litt.) 10b-11a. In the same way, Bacon employed indistinctly the terms *rules*, *regulae* and *maxims*. His terminology on this regard is confusing,
laws have become visible at least since 1596, when he wrote his book on maxims.\textsuperscript{28} By then Bacon contended that collecting legal maxims was the most profitable favor that might be done to jurisprudence.\textsuperscript{29} Bacon intended the compilation maxims to supply a powerful tool to interpret the law, to the point that the challenging uncertainty might “be somewhat the more settled and corrected”.\textsuperscript{30} He insisted that the maxims would provide “no small light” to solve legal uncertainty.\textsuperscript{31} The maxims were intended to amend “the very nature and complexion of the whole law” to a considerable extent. In particular, they can embellish legal argumentation, remove semantic obscurity by reducing the “unprofitable subtlety” to “a more sound and substantial sense of law”, and correct “vulgar errors”.\textsuperscript{32} All of these programmatic statements bear witness to the fundamental role that Bacon ascribed to the maxims in the quest for legal certainty.

Bacon’s characterizations of maxims display a blend of the English common law and the Roman civil law traditions.\textsuperscript{33} The maxims of the law are said to be the “foundations of the law” and „the full and hard conclusions of reason“, “dictamina generalia rationis”, „the rules and grounds”, dispersed throughout the body of the laws, the “ballast” of the laws (\textit{saburra juris}).\textsuperscript{34} The maxims are thought to be laws of laws, since the particular laws are their point of departure.\textsuperscript{35} As compass points out the poles, the maxims point out the law, once the laws have been settled.\textsuperscript{36} The gathering of maxims should be in charge of the most skilled and wisest jurists. Particular attention should be drawn to “the more subtle and hidden rules, which can be extracted from the harmony and congruence of the laws and the cases”.\textsuperscript{37} On the

\begin{itemize}
  \item especially when the uses in different writings (\textit{The Advancement of Learning}, \textit{De Augmentis Scientiarum} and \textit{Maxims}) are compared. The terminological difficulty becomes more apparent as Bacon introduces distinctions between different kinds of maxims, by separating rational maxims from positive maxims (see \textit{Maxims}, SEH, VII, 320; 358; 360; \textit{Advancement}, SEH, III, 477–8; \textit{De Augmentis Scientiarum}, SEH, I, 832–3). I tried elsewhere to give some light at least to part of this confusion (Manzo, S. (2006), “Francis Bacon: Freedom, Authority and Science", \textit{The British Journal of the History of Philosophy}. XIV, 2, 245-273), but now I realize that Neustadt (1987) pp. 53-56, provides a stronger, despite still incomplete, interpretation. In this paper I refer only to the “rational maxims”.


\textsuperscript{29} See also \textit{Amendments of the laws}, SEH, XIII, 70.

\textit{Maxims}, SEH, VII, 319.

\textsuperscript{30} \textit{Maxims}, SEH, VII, 319-320.

\textsuperscript{31} \textit{Maxims}, SEH, VII, 320.


\textsuperscript{33} \textit{A Brief Discourse upon the Commission of Bridewell}, SEH, VII, 509; \textit{Tractatus}, SEH, VII, 823, aph. 82; \textit{Maxims}, SEH, VII, 319-320, \textit{Amendments of the law}, SEH, XIII, 70.

\textsuperscript{34} Kocher (1957) and Martin (1992) pp. 164-171 hold that both Baconian natural laws and legal maxims obtain by induction. Particularly, Martin claims that there is a parallel between natural history and laws of nature, on one side, and law reports and maxims of law, on the other side. For a critical approach of Kocher’s thesis see Jardine (1974) 105n1. On the legal non Baconian sense of induction see Kelley (1988) p. 99.

\textsuperscript{35} \textit{Tractatus}, SEH, VII, 823, aph. 85

\textsuperscript{36} \textit{Tractatus}, SEH, VII, 823, aph. 82. Cf. \textit{Maxims}, SEH, VII, 320. Bacon employed a musical comparison to illustrate the relationship between particular laws and maxims, like François Hotman, a prominent French Humanist jurist: "Differt [...] Lex a Regula: quod illa dicitur, quam populus certo et cognito omnibus iure constituit: Regula vero, quam lurisconsulti ex pluribus legum capitis notatis inter seque comparatis eliciuerunt: ut non omnino incommode dicere possumus, leges esse tanquam voces, et sonos singulos: Regulam vero esse tanquam harmoniam et concentum", François Hotman’s \textit{Commentarius de verbis juris} (Lyon, 1569) p. 324, apud Maclean 2008, p. 33 n. 19; id. (2000), p. 235 n3. Hotman’s comparison seems to have become a
other hand, Bacon’s featuring of the strong dependence of the maxims on the laws reproduces literally a statement of the section of Justinian Digest labeled De diversis regulis juris: “the law should not be derived from rules, but the rule should be made out of the existing law”.38

Debs to the English tradition of maxims are similarly evident. The notion of maxim mostly assumed by early-modern English lawyers is captured in John Rastell’s law dictionary. The entry ‘maxims’ runs as follows:

[Maxims are] the foundations of the law and the conclusions of reason, (…) causes efficient, and universal propositions, so sure and perfect that they may not be at any time impeached or impugned, but ought always to be observed, and helden as strong Principles and Authorities of themselves, although they cannot be proved by Force of Argument or Demonstrations logical, but are known by Induction, by the way of Sense and Memory.39

Rastell’s entry blends two fundamental long-standing elements of the notion of maxim deeply entangled in the legal English tradition. On the one hand the idea that maxims are firmly grounded on reason.40 On the other, the assumption according to which the maxims are obtained by induction.41 Anyone who denied or just questioned a legal maxim ran the risk of being regarded irrational. The early English conviction that law had immemorial origins and a rational character, synthesized in the ubiquitous dictum “common law is common reason”, underpins the claim that maxims are conclusions of reason exempted from proof.42 Moreover, Bacon thought that the laws of different countries were grounded on the same universal reason „as it were dictated verbatim by the same reason“.43 Hence, maxims can be gathered from the concordance among the authentic laws shared by different law systems.
Although Bacon himself occasionally acknowledged his debts to English and Roman traditions on legal maxims, he felt that no existing collection of maxims satisfied him. In his opinion, they failed both to expose the maxims and to use authorities. Bacon’s worry about the accurate exposition of the maxims concerns mainly their didactic function. If law students should profit from maxim books, then the maxims should not be set down alone “like short dark Oracles”. Because of the lack of proper exposition, the maxims of Roman and English tradition became in fact “proverbs and many times plain fallacies”, dead words without apparent application to concrete cases. To avoid these shortcomings, Bacon set out that the maxims should be offered “with a clear and perspicuous exposition, breaking them into cases, and opening them with distinctions, and sometimes showing the reasons above whereupon they depend, and the affinity they have with other rules.”

As for the use of authorities, Bacon showed a critical stance which contrasts to the common practice of the day. He argued that even though it might have been more pleasant and ostentatious to digest authorities, he refrained to do that, because he judged “a matter undue and preposterous to prove rules and maxims.” On the other hand, Bacon added that in the examination of some legal cases which were exposed for explaining the maxims, he intended “expressly to weigh down the authority by evidence of reason, and therein rather to correct the law than to soothe a received error, or by unprofitable subtlety, which corrupteth the sense of law, to reconcile contrarieties; for these reasons I resolved not to derogate from the authority of the rules, by vouching of any of the authority of the cases.”

For Bacon, authorities, only when necessary, may be referred to as occasional complements for the explanations of maxims. The “warranty” given by authorities should never be understood as proof of a maxim. The rational ground and “the evidence of reason” elicit the legitimacy of the maxims. The maxim sums up the reason contained in the particular laws and summarizes the “certain sense” of the law by means of a clear sentence.

Law interpretation in the making

When looking at Bacon’s works as a legal practitioner, many hints of his precepts for achieving the certainty of laws become apparent. His interpretations of statutes and legal cases evince the concrete way in which he attempted to render the English law more certain. These sources allow us to grasp how a Baconian interpretation of the law works and which are its assumptions.

In line with the natural law tradition, Bacon described the law as a transcendental, intelligent, intentioned and autonomous entity and emphasized the rationality of the law as

---

44 Bacon might be thinking on Justinian De Diversis Regulis Juris; Christopher St. Germain, Doctor and Student (1523); Anonymous, Principia sive Maximae legum Anglia (1546); William Fulbeck, A Direction or Preparative to the Studie of the Law (1600); and Henry Finch, Nomotechnia (1613). For a detailed analysis of some of these works as Bacon’s precedents see Neustadt (1987) 48–77.

45 Bacon’s mention of “directions” bears witness to the practical objectives of the book De reguli juris. Bacon used here “direction” in the sense of instruction to practice, as contrasted to useless theoretical knowledge. Cf. Valerius Terminus, SEH, III, 11.

46 Maxims, SEH, VII, 323.

47 Maxims, SEH, VII, 322.
being emanated from natural reason. He frequently referred to the “very natural sense”\(^{48}\), “the sense of law” and the “natural construction”,\(^{49}\) the “natural exposition”\(^{50}\) of the law.\(^{51}\) A natural construction displays “the intent and letter of the statute, the sense,”\(^{52}\) Bacon’s efforts to counter deviate interpretations are said to be “without offering violence to the letter or sense”.\(^{53}\) When giving his interpretation of the legal clause *ab impietione vasti*, Bacon insisted that his construction of the sense of the clause “is natural in respect of the words, and, for the matter, agreeable to reason and the rules of law.”\(^{54}\) The law “never intends error or falsehood.”\(^{55}\) The law knows its words\(^{56}\) and employs them according to its ends. When necessary, the law can place the words distinctly “at will”, that is, the law can use the words in an unusual meaning: “the wisdom of the law uses to transport words according to the sense, and not so much to respect how the words do place, but how the acts, which are guided by those words, may take place.”\(^{57}\) In arguing on a case of revocation of uses, Bacon pointed out that law did justice in taking words so “as no material part of the parties’ intent perish”. Hence, in order to preserve the parties, the law occasionally admits of meanings contrary to the usual meanings of words.\(^{58}\) Accordingly, a proverb says: it is better wrest words that wrest men [*praestat torquere verba, quam homines*].\(^{59}\) In a similar way, Bacon’s discourse on the impeachment of wastes concludes that “the reason and wisdom of law doth match things as they consort, ascribing to permanent states permanent interest, and to transitory states transitory interest.”\(^{60}\) Thus, it becomes evident how the admirable wisdom of law has “consent with the wisdom of philosophy, and nature itself.”\(^{61}\)

Interpretation aims to repair the inconveniences of legal uncertainty. When the law is doubtful or ambiguous interpretation serves to clear it. The “expositio naturalis” of the law, which searches for the true sense of the law, is opposed to the “expositio contentiosa”, whose aim is to exhibit the useless subtlety of human wit.\(^{62}\) In the preface of his reading on the statute of uses, Bacon claimed that the design of his lecture was “to open the law upon doubts, and not to open doubts upon the law”.\(^{63}\) To make something clear is “the true use” of the

---

\(^{48}\) Cudleigh’s case, SEH, VII, 623.

\(^{49}\) It seems that Bacon employed the terms “construction” and “interpretation” indistinctly. The legal meanings of construction provided by OED are similar to the legal meaning of “interpretation”: “a. The explaining or interpreting of the words of a statute, deed, or other legal document; b. A particular explanation or interpretation put upon a law, etc.”, OED, s.v.

\(^{50}\) The Jurisdiction of the Marches, SEH, VII, 598.

\(^{51}\) Reading on the Statute of Uses, SEH, VII, 397.

\(^{52}\) Cudleigh’s Case, SEH, VII, 624-5.

\(^{53}\) Reading on the Statute of Uses, SEH, VII, 398.

\(^{54}\) Case of impeachment of Waste, SEH, VII, 528.

\(^{55}\) Maxims, SEH, VII, 361.

\(^{56}\) “the word value is a word well known to the law, and therefore cannot be (except it be willingly) misunderstood”, The case of revocation of uses, SEH, VII, 565.

\(^{57}\) The Case of Revocation of Uses, SEH, VII, 558-559.

\(^{58}\) “(...) the law delighteth to make atonement, as well between words as between parties, and will reconcile them, so as they may stand, and abhorreth vacuum, as well as nature abhorreth it; and as nature, to avoid vacuum, will draw substances contrary to their property, so will the law draw words.” The Case of Revocation of Uses, SEH, VII, PP

\(^{59}\) The Case of Revocation of Uses, SEH, VII, 561. A similar rationale seems to be assumed in Bacon’s explanation of Maxim XI. See Maxims, SEH, VII, 350.

\(^{60}\) Case of Impeachment of Waste, SEH, VII, 533.

\(^{61}\) Case of Impeachment of Waste, SEH, VII, 529. For more references to “the wisdom of the law” see Reading on the Statute of Uses, VII, 420, 421

\(^{62}\) The Jurisdiction of Marches, SEH, VII, 598.

\(^{63}\) Reading on the Statute of Uses, SEH, VII, 396.
human mind. Wise lawmakers should take into consideration “by what means laws may be made certain, and what are the causes and remedies of the doubtfulness and uncertainty of law.” Expertise and control are fundamental requisites for reaching legal certainty, both in legislating and in interpreting the law. Judges are permitted to interpret the law because of his legal expertise.

Bacon was familiar with the Roman law formula *optima legis interpretes consuetudo* (“custom is the best interpreter of the law”), alluding to a kind of interpretation known as “consuetudinary interpretation.” Even though he accepted it as a “good rule”, he evinced a critical stance about how custom might legitimate the interpretation of the law: “our labour is not to maintain a usage against a statute, but by a usage to expound a statute”; “where the law appears, contrary usage cannot control the law; which do not at all infringe the rule of *optima legum interpres consuetudo*; for usage may expound law; though it cannot overrule law.” Custom should be regarded when the law needs to be cleared: “we do not bring usage to cross an act of parliament where it is clear, but to expound an act of parliament where it is doubtful.”

How the interpretation of the law actually works? Most often Bacon made efforts to remove ambiguity and obscurity with tools provided by rhetoric and grammar. For instance, in determining the sense of the word “value” Bacon argued that, first of all, it was necessary to consider “what the law generally intend by the word value” and, second, “to see what special words may be in these clauses.” In trying to construct the sense of the legal concept of use, he claimed that it was helpful to consider firstly what a use was not. Ambiguity is cleared after a methodical examination and careful weighing of *pro* and *contra*. A typical instance runs as follows:

the word ‘estate’ is an ambiguous word, and signifies sometimes the quantity or continuance, (...); sometimes it signifies the substance of the interest. But it is to be shown infallibly that in this case it cannot be taken for the former but for the latter, by the words which follow, ‘of and in such like estate as they have or shall have’. In this second place it is taken in the former construction, which will be a vain tautology and repetition if the words were so taken in the former place; for if one took away the words adjoining, which cast a shadow between the matter [before and after] the text amounts to this, that they shall be adjudged in lawful estate of such estate, etc, whereby it evidently appears that the word estate goes first to substance, and after to

---

64 “I will not deny, but it is a great power of wit to make clear things doubtful; but it is the true use of wit to make doubtful things clear, or at least to maintain things that are clear to be clear, as they are.” The Case of Revocation of Uses, SEH, VII, 558.
65 The Advancement of Learning, SEH, III, 475.
66 Essay of Judicature, SEH, VI, 508.
68 The Jurisdiction of the Marches, SEH, VII, 590.
69 The Jurisdiction of the Marches, SEH, VII, 610.
70 The Jurisdiction of the Marches, SEH, VII, 598.
71 The Case of Revocation of Uses, SEH, VII, 565.
72 Reading on the Statute of Uses, SEH, VII, 398: “for is the nature of all human science and knowledge to proceed most safely by negatives and exclusion, to what is affirmative and inclusive.”
quantity: so possibility is excluded. This observation requires attention, as all subtilties of words do; but being rightly considered, it is plain enough.  

Also when discussing the sense of the legal concept of use, Bacon brought forth an interpretation that drew the attention to the right sense of Latin prepositions. To expound legal statutes, Bacon recommended the common procedures of “scholars”: “first, to seek out the principal verb; that is, to note and single out the material words whereupon the statute is framed: for there are, in every statute, certain words, which are veins where the life and blood of the statute is and runneth, and where all doubts do arise and issue forth: and all the rest of the words are but literae mortuae, fulfilling words.” Occasionally etymologies are employed for grasping the right interpretation of the law. Further, the consideration of the general context of the statute is said to give light to words whose meaning cannot be gained by other means: “in words dubious it is necessary to embrace the intention of the statute.”

A considerable amount of Bacon’s maxims aims to rescue words from ambiguity. Sometimes the ambiguity of words is thought to be stem from collateral facts that have not been explicitly accounted for. This kind of ambiguity, labeled ambiguitas latens, can be supplied with the verification of facts. From the maxim “that a man’s deeds and his words shall be taken strongest against himself”, Bacon derived instructions to evaluate the words of parties in pleadings. The large exposition of this maxim summarizes most of his ideas on the problems arisen from ambiguity and his strategies to solve them. This maxim is said to be “author of much quiet and certainty”. It serves to decide between the requests of parties, by solving questions and doubts “about construction of words”, since it brings more certainty on one of the sides at issue. Bacon introduced further maxims that are said to be stricter than the former one, so in case that these milder maxims may not be applied, the harder maxim should be employed as last resort; words are so to be understood, that they work somewhat, and be not idle and frivolous. Bacon disclosed carefully the different applications of these maxims in grants and in pleadings. On the other hand, he set out that they had no effect in public acts as acts of parliament, verdicts, and judgments, nor in wills. Moreover, he remarked that they were ineffectual in evidence.

Bacon constantly weighted the reasons alleged for contrary interpretations. Stronger reasons always prevailed over weaker ones. When an interpretation is grounded on

---

73 Cudleigh’s Case, SEH, VII, 630.
74 “For the words are not de possessionibus ad usus, but in usus transferendis; and as the grammarian saith, præpositio ‘ad’ denotat motum lationi, sed præpositio ‘in’ cum accusativo denotat motum alterationis.” Reading on the Statute of Uses, SEH, VII, 417. I ignore the source of Bacon’s definitions of the preposition but it is interesting to note the Aristotelian background of them. A similar strategy is to be found in Bacon’s explanation of maxim X: “copulatio verborum indicat acceptionem in eodem sensu, and the word de (anglice out of) may be taken in two senses, that is, either as a greater sum out of a less, or as a charge out of land or other principal interest”, Maxims, SEH, VII, 337.
75 Reading on the Statute of Uses, SEH, VII, 423-424.
76 For instance, Bacon asserted that the word firmarius comes “a firmando”, “because he [Mr. Heath] makes the profit of the inheritance, which otherwise should be upon account and uncertainty, firm and certain.” Case of Impeachment of Waste, SEH, VII, 531-2.
77 Cudleigh’s Case, SEH, VII, 629. Cf. ib, 628: “ex omnibus verbis eliciendis est sensus qui singula interpretatur” Cf. Advancement of Learning, SEH, III, P.
78 Maxims, SEH, VII, 385-387.
79 Maxims, SEH, VII, 333.
80 This particular maxim is introduced newly as maxim number X. See Maxims, SEH, VII, 356-357.
81 Maxims, SEH, VII, 333-342.
unsatisfactory reasons, “the absurdity and incongruity of the reason alleged destroys the conclusion, credit and authority of it”. Hence, the case “is of no credit against such a mass of arguments and reasons.” On the other hand, Bacon set out a rule to remove the ambiguity of the law in case that two or more interpretations can be grounded on equally acceptable reasons. The rule urges to ponder the inconveniences produced by each interpretation and sets out to prefer the less harmful interpretation in this regard, reproducing a formula of the Roman law: \( \text{in ambiguis eam sequimur rationem quam vitio caret} \). Once the wrong interpretations have been taken off, Bacon supplies a typical methodical argumentation for grounding the clear and certain interpretation, which offers the “true meaning” of the law.

*****

To sum up, Bacon’s accounts of the certainty of the law, I submit, are grounded on two main assumptions:

1) The certainty of the law admits of degrees and is strongly grounded on the rational character of the law. A more rational interpretation renders a more certain exposition of the law, since it is closer to the essential reason inherent in law.

2) The certainty of the law comprises the relation of laws’ words to laws’ “ints”. A law is certain to the extent that the words expressing it denote exactly its intents. In this regard, Bacon’s notion seems to intend an objective sense of certainty. Certainty is thought to be an objective condition of the law, rather than a subjective state of mind. Accordingly, no proof is required for claims to legal certainty. This kind of certainty does not need to be proved, but to be elucidated by the interpreter. Interpretation is, hence, the human attempt to discover the objective certain meaning of the law. It might be said that an interpretation is certain in a translative sense, to the extent that it represents the certainty that lies in the law as in its original place.

82Cudleigh’s Case, SEH, VII, 622.
83The rule is applied, for instance, in Cudleigh’s case: “But if the statute were not clear on my side, as I have made it apparent that it is, but only ambiguous, --in which case that construction ought to be taken which is less mischievous,-- I think it fit to consider the mischiefs or inconveniences, which are in their sorts”. Cudleigh’s Case, SEH, VII, 631. In this case Bacon refutes one “assertion”, by arguing that “it is grounded upon a probable reason, and upon a special book”
84Cudleigh’s Case, SEH, VII, 618. Cf. the little different version in Maxims, SEH, VII: “that the law will not intend a wrong, which the Civilians utter thus: \( \text{Ea est accipenda interpretatio, qua vitio caret} \).” The same rule seems to be appealed to in Case of the Impeachment of Waste, VII, SEH, 528: “if the interpretation seems ambiguous and doubtful, yet the very mischief itself, and consideration of the commonwealth, ought rather to incline your lordships’ judgment to our construction”. Ib., SEH, VII, 537. See Piano Mortari (1956) p. 30.
85See, for instance: “Therefore, laying aside these two constructions, whereof the one is not maintained to be, the other cannot be: let us come to the true sense of this clause \( \text{[ab impetitio vasti]} \), (…). Wherein I will speak first of the words, then of the reason, then of the authorities which prove our sense, then of the practice which is pretended to prove theirs; and, lastly, I will weigh the mischief how it stands for our construction or theirs.” Case of Impeachment of Waste, SEH, VII, 539-40.
From these basic assumptions derive some consequences about who may be an interpreter and how legal hermeneutic should be accomplished:

3) The act of mediation (interpretation) between the words of the law and their implicit intents must be done by the jurist. Jurists are experts in law, educated to know the reasons of the law. Otherwise it would be impossible to discover its hidden meaning.

4) The tools and methods of reaching certain interpretations are provided by the arts related to language and probable reasoning: rhetoric, grammar, and dialectic. Jurists should be conversant not only with the reasons of the law but also with humanistic disciplines in view of their hermeneutic value.

II. Certainty and facts

Once ordeal trials were relinquished after their abolition in the Lateran Council (1215), the establishing of facts became a central concern of legal procedures. In England the ordeal proof was replaced by the jury trial system. This system differentiated the functions of jury from the functions of judge, in making the first responsible for the establishing of facts (matter of facts) and the second responsible for the application of the law (matters of law). The trial jury experienced significant variants from late-medieval times to the nineteenth century, as beyond-reasonable-doubt standard was clearly formulated. In every stage of this long process, the trial practices were neither necessarily uniform nor stable or coherent. In its early stages, the jury was conceived as a self-informing body, whose members were witnesses who knew the facts. They were considered to be in the best position for discovering the facts, since they were supposed to have previous knowledge relevant to the issue.

By Tudor times, impartial jury replaced the self-informing jury. Jurors were required to reach unanimous verdicts according to conscience, understood as courtroom-like forum. Unlike the fixed rules of evidence by which continental examinations of facts were bounded, well into the eighteenth century there were no firm rules establishing minimum standards of evidence for conviction in English trials, and consequently there was no appellate review of verdicts for insufficiency of evidence. Treason trials represented the only exception in this regard, since a series of statutes required two witnesses as standard of proof in such cases. Inner persuasion was enough to convict, even without any witnesses at

---

89 Langbein (1978) p. 266.
all. On the other hand, it was commonly assumed that circumstantial evidence was inferior to eyewitnesses or to confession. Nonetheless, hearsay and past convictions were frequently accepted as evidences and no rule prohibited them. Thus, early-modern jurors were still permitted to add evidence coming from their own knowledge of the fact. Juries were not asked to give reasons for their verdicts and legal facts were not expected to reach the absolute certainty of mathematical demonstration. Explicitly or not, the certainty of legal facts was assumed to admit of probability degrees. They belonged to the epistemic range of moral certainty.

An important feature of the early-modern English procedure was the distinction between the gathering of evidence directed by court and justice officers, mainly by the judges, and the trying of facts, which was the function of the jury. Jury was a passive body whose exclusive duty was to examine and weigh up evidence. Jurors neither prepared interrogatories nor participated in them. Occasionally they could ask for more evidence and suggest the court new interrogatories or new witnesses. But on the whole, by this period the jury did not intervene in the activity of inquiry. The judge was not permitted to influence or to participate in the deliberations of the jury. In practice, however, the convention of the autonomy of the jury as fact-finder was not always rigorously followed. Frequently, judges tried to secure the “right” verdict and issued instructions to manage the evidence accordingly. In fact, several mechanisms of jury control evolved informally until the evidence standards were clearly formulated in the nineteenth century.

Throughout the different stages of his legal career, Bacon was well acquainted with the ordinary procedures of civil and criminal trials for the establishing of facts. He knew the practical problems experienced by the system, the way in which legal facts were established, and the degrees of certainty reached. He seems to have thought that the standard procedures to establish facts by means of jury trial did not require any substantial improvement in order to reach facts with higher levels of certainty. Nonetheless, occasionally Bacon gave some minor instructions and advised to improve or modify some details of the proceedings. Whereas he was worried about the uncertainty of the laws, he did not complain about the way in which the certainty concerning alleged facts was examined in English trials. It is well known that Bacon set out guidelines, allegedly inspired in his legal expertise, to examine, to report and to classify natural facts. Given Bacon’s interest in the collection and narration of natural facts, it might be expected that he also evinced a deep concern on the ways of establishing legal facts. Remarkably, this is not the case. Relatively little is found in Bacon’s legal writings about the concrete ways of establishing facts, at least in a systematic and programmatic way. Only some rules of evidence are suggested occasionally, as Bacon dealt with particular cases. Bacon’s treatment of the certainty concerning facts is, thus, far more difficult to trace than his conception of the certainty of laws. Whereas the certainty of laws is a central concern of law reform project, the certainty concerning facts does not play a significant role in it, to the point that he rarely expressed his thoughts about factual legal certainty. His silence on this subject

93 Bacon’s ordinances in Chancery 68-79 are instructions more or less related to the examination of witnesses. Ordinances in Chancery, SEH, VII, 769-770, # 68-79.
might be understood as a tacit acceptance of the practices and discourses of the day. In what follows I will point out Bacon’s explicit claims on the certainty concerning facts and the rule of evidence.

With regard to the credibility of witnesses, Bacon set out that “in cases as in testimonies, if one is found faulty in one point it deserves no credit in others”. Coherence between testimonies and legal writings (instrumenta) is another rule devoted to weigh up the credit of testimonies, since if the alleged writings have no credit, the testimony fails credit. The most recognizable rule directly related to certainty is to be found in the maxim 24. This maxim, probably inspired in a Roman law rule, establishes three degrees of certainty for determining the identity of things or persons, and gives precise directions on how to reach the highest possible certainty:

There be three degrees of certainty: presence; name; and demonstration or reference: whereof the presence the law hold of greatest dignity, the name in the second degree, and the demonstration or reference in the lower, and always the error or falsity in the less worthy shall not control not frustrate sufficient certainty and verity in the more worthy.

The “presence of the body” removes the errors of name or of indirect references to the thing or person. Bacon introduced a further category intermediate between presence and name, constituted by “a kind of representation” of the presence (e.g. a picture that represents the body of an absent person). Again, names may be more or less certain, assuming that the proper names obtain the highest degree of certainty possible for names. Precise time and space data confer more certainty than vague references. As for things which do not have a proper name, a concurrence of certain circumstances referring to the thing is said to convey enough certainty of its identity. Thus, Bacon assumes that the visibility of the thing or person yields more certainty than any other kind of proof of its identity. The more precise the name, space, time and circumstances, the more certain the facts alleged. Certainty, at least in this context, seems to be assumed as an attribute of facts equivalent with precision, exactness, and accuracy.

As for the trial system, Bacon, like most English jurists of the day, was convinced that the institution of jury was one of the “fundamental laws and customs of England.” The jury trial shows the excellence of the common law procedure by shortening trials, and by impeding infinite series of examinations and re-examinations. Bacon alleged that this kind of

---

94 Cudleigh’s Case, SEH, VII, 619-620.
95 Cudleigh’s Case, SEH, VII, 627.
96 Digest 18.1.9.1 (Ulpian) ‘nihil enim facit error nominis, cum de corpore constat’.
97 Maxims, SEH, VII, 380-384.
98 Maxims, SEH, VII, 380.
99 Maxims, SEH, VII, 381.
100 Maxims, SEH, VII, 381.
procedure, avoided the use of “rigorous torture” in capital crimes. Finally, Bacon remarked that jury trial was superior to the inquisition continental system, for the law did not give its “trust and confidence” to one and the same person for being both judge of laws and judge of facts. Jurors are the “judges of the fact”, “upon whom lieth a principal part of judicature (...) which try and decide the issues and points of fact in all controversies and causes”.

Bacon emphasized that jury trial had to secure the autonomy of juries’ consciences and understandings. Jurors are not to be bound by the “evidence and proofs produced” by the prosecution. They are free to weigh up the evidence and, if necessary, they are allowed for asking new witnesses (except that the required witnesses had been sentenced by perjury). The English law, Bacon argued, trusts the discovery of facts to the juries and “leaveth the discerner the discerning and credit of testimony wholly to the juries’ consciences and understanding, yet to their private knowledge.” The weighing up of evidence demands a “wise and sifting examination of the fact”, especially when testimonies are “obscure and failed.” On the other hand, Bacon admitted that jurors were free to add further evidence out of their own knowledge, whereas the court may not supply any factual knowledge “not within the pleas”. Notwithstanding, Bacon’s defense of jury’s autonomy is at odds with some of his interventions in concrete cases, and, at the same time, consonant with the usual practice in English trials. Being Attorney General, he was commissioned to a murder case. Since the accused were noblemen, the jury was composed of noblemen. Bacon said to be convinced that the evidence of the case was “of a good strong thread”. Notwithstanding, he added “that the thread must be well spun and woven together.” Given the particular difficulties of the case and the social status of the accused and jurors, Bacon advised the King “to be careful to choose a Steward of judgment that may be able to moderate the evidence and cut off digression.” Furthermore, added Bacon, special attention should be paid to “the ordering of the evidence.”

According to Bacon, “straitness and coercion” are unique features of English trials, whose positive consequences enhance them upon the continental inquisition procedures. The discipline and compelling conditions of the English system, Bacon claimed, enforce jurors to obtain “full proof and evidence” and to give unanimous verdicts rapidly:

---

103 Bacon maintained that in England, “in the highest cases of treasons, torture is used for discovery, and not for evidence”, Certain Considerations touching the better the Pacification and Edification of the Church of England, SEH, X, 114.
104 Proclamation concerning Jurors, SEH, X, 390-391.
106 The Court of Chancery is described as the “general conscience of the realm”, Reading on the Statute of Uses, SEH, VII, 401.
107 Maxims, SEH, VII, 341-342.
109 The King’s Attorney’s Letter to the King touching the Proceeding with Somerset, 22 January 1615, SEH, XII, 231-232.
110 To my knowledge, Bacon said nothing about the standard of full-proof. The continental standard established that full-proof (plena probatio) was obtained by two eye-witnesses or by confession. In contrast, in England there was no fixed standard. In practice, Edward Coke’s degrees of presumptions, which actually repeats a worldwide standard threefold distinction of presumptions (Franklin, J. (2001). The science of conjecture: Evidence and probability before Pascal. Baltimore: Johns Hopkins University Press, p. 22) were mostly applied: 1) light or temerary; 2) probable; 3) and violent. Coke claimed that violent presumption “manetimes” is a plena probatio. Cf. Co. Litt. 6b. Giuliani (1962) p. 241.
For trials, no law ever took a straiter course, that evidence should not be perplexed nor juries inveigled, than the common law of England; as, on the other side, never law took a more precise and strait course with juries, that they should give a direct verdict. For whereas in a manner all laws give the triers, the jurors, which in other laws are called judges de facto, a liberty to give non liquet, that is, no verdict at all, and so the cause to stand abated; our law enforceth them to a direct verdict, general or special: and whereas other laws accept plurality of voices to make a verdict, our law enforceth them all to agree in one: and whereas other laws leave them to their own time and ease, and to part and to meet again; our law doth duress and imprison them in the hardest manner, without light, or comfort, until they be agreed. In consideration of which straitness and coercion, it is consonant that the law do require in all matters brought to issue, that there be full proof and evidence.111

The use of oaths in depositions was a major point of difference between English common law and English canon law. Bacon maintained that some practices of the ecclesiastical Court of High Commission should be reformed by imitating the usual proceedings of the common law. Some of his advice dealt with the use of oaths. On the first place, Bacon held that the oath ex officio was contrary to the common law rule according to which “no man is bound to accuse himself”.112 On the second place, in capital matters, the oath is neither required to the accused nor permitted. On the third place, although in the Star Chamber and the Chancery trials of non capital crimes require the oath of the parties, the party’s rights against self-incrimination are still protected.113

As for the selection of jurors, Bacon was worried about the practical problems experienced by courts officers to arrange suitable juries. The only qualification required by English law for being member of a jury was that they should be freeholders.114 By the middle of the seventeenth century and well into the eighteenth century it was common practice that some persons were called for juries more than once. Jurors were commissioned to multiple trials at the same session and verdicts were expected to be reached rapidly, so jury sessions usually lasted few weeks. Given these circumstances and exigencies, experienced jurors were thought to be particularly efficient.115 On the other hand, since jury service was time consuming, troublesome and less attractive, the gentry tried to be relieved from it by using their influences on law officers.116 Hence, by Bacon’s time, gentlemen rarely served as jurors and juries were composed mostly of middle-class modest freeholders. This situation led him to complain that the responsibility for jury trials lay mostly on men which were “both simple

111 Reading on the Statute of Uses, SEH, VII, 419-420.  
113 Certain Considerations touching the better the Pacification and Edification of the Church of England, SEH, X, 114.  
114 Women were by custom excluded. Baker (1986), p. 269.  
and ignorant, and almost at a gaze in any cause of difficulty.” Bacon regretted that that kind of men became so accustomed to serving as jurors that they “have almost lost that tenderness of conscience which in such cases is to be wished”. They actually acted in juries as if jury service were their proper occupation. Bacon insisted that juries should be constituted by “men of such quality, credit, and understanding, as are worthy to be trusted with so great a charge.” In order to repair this long established practice and “to restore” the jury trial “to the ancient integrity and credit”, he gave a set of instructions tending to warrant that the gentry would fulfill the jury duty.

While it was a common practice that in jury trials experts, mostly physicians, were called to testify for giving more plain evidence on facts in cases involving particular matters, jurors were not required to have legal expertise. For Bacon, jurors had to be learned (as opposed to simple and ignorant people), but not necessarily legal experts. On the other hand, he thought that “tenderness of conscience” and impartiality were necessary conditions to bear a disinterested examination of the proofs. In an accusation speech, he praised the “singular temper and indifference” of the examinations of the case, alleging that it was conducted “without prejudice”, to the point that the examination was *tangquam tabula rasa*. To sum up, the “discovery of facts” should rest on the private knowledge, conscience and understanding of good, learned and reasonable people.

The satisfaction of conscience in examining alleged facts seems to have been taken seriously by Bacon himself, as he had to give his opinion about the evidence of the trial of John Cotton, accused of high treason for being allegedly author of a treacherous book. As a member of the Commission appointed to the case, Bacon (Attorney), along with H. Montagu (Solicitor) and H. Yelverton (Sergeant), reported:

[we] have advisedly perused and weighed all the examinations and collections which were formerly taken; (...). We thought fit also to take some new examinations; (...). Upon the whole matter, we find the cause of his imprisonment just, and the suspicions and presumptions many and great; (...) But nevertheless, the proofs seem to us to amount to this: that it was possible he should be the man [who wrote the book]; and that it was probable likewise he was the man: but no convicting proofs that may satisfy a jury of life and death, or that may make us take it upon our conscience, or to think it agreeable to your Majesty’s honour (which, next our conscience to God, is the dearest thing to us on earth) to bring it upon the stage.

This report shows that the “possibility” and “probability” supplied by the evidence were valued as insufficient to satisfy the conscience. A similar instance is to be found in the

---

118 Proclamation concerning Jurors, SEH, X, 391.
119 Accusation of Sir John Wentworth, Sir John Hollys and Mr. Lumsden, SEH, XII, 217. For instance, as Bacon was in charge of the Chancery, a defendant petitioned to remove law officers, which formerly had been commissioned to examine his case, alleging that they were partial. Bacon accepted the petition and ordered that a new commission were constituted, and other “indifferent persons” were named to new interrogatories. See Ritchie, J. (1932). Reports of cases decided by Francis Bacon, Baron Verulam, Viscount St. Albans, Lord Chancellor of England, in the High Court of Chancery (1617-1621). London: Sweet & Maxwell, p. 118
120 On Cotton’s case see Spedding preface, SEH, XII, 4.
121 Report on the evidence against John Cotton, SEH, XII, 4-5.
trial of Edmund Peacham, accused of high treason, in which Bacon was commissioned to interrogate the defendant under torture. After one of the examinations, Bacon said to be himself “bound in conscience” to advise James to reassess the case.122

Bacon’s familiarity with the practical differences between the function of the judges and the function of juries led him to ascribe impartiality and certainty to the pleading, and partiality to the evidence given by the parts. Pleadings have the aim to “open the verity of the matter in fact indifferently on both parts.” They have “no scope and conclusion to direct the construction and intendment” of the parts, and therefore, pleadings “must be certain.” On the contrary, evidences are “the proofs of an issue.” Consequently, “in evidence and proofs the issue, which is the state of the question and conclusion, shall incline and apply all the proofs” as tending to a determined conclusion.123 The failings of the evidence alleged by one part may be corrected by the intervention of the jury or by a demurrer presented by the adverse part. On the other hand, Bacon recommended that judges arrange and direct the evidence in trials and, at the same time, examine the case impartially.124

*****

The second part of this paper likely reflects that my research on Bacon’s ideas on the certainty about legal facts is in its very first stage. Nonetheless, I would like to put forward some working hypothesis:

1) The certainty concerning facts seems to be intended by Bacon, somewhat tacitly, in two senses: a) an objective sense expressed in the attributes of precision required for a fact to be certain, at least as far as the identity of persons and things are concerned (i.e. the specific determinations of space, time, circumstances, etc., of the facts); b) a subjective sense referring to the specific state of human mind that reaches the point of discovering facts (i.e., the conscience of jurors that determine with full conviction that an alleged fact truly happened).

2) The certainty concerning facts is more difficult to obtain because of the contingency of human events. Human free will impedes that any necessary behavior framework may be expected from human events. Actually, trials deal with alleged transgressions of rules.

Conclusion: The polysemy of legal certainty

122 Letter to the King concerning Peacham, 12 March 1614, SEH, XII, 126.
123 Maxims, SEH, VII, 341.
124 “It is no grace to a judge, first to find that, which he might have heard in due time from the bar; or to show quickness of conceit, in cutting off evidence or counsel too short; or to prevent information by questions, - though pertinent. The parts of a judge in hearing, are four: to direct the evidence; to moderate length, repetition, or impertinency of speech; to recapitulate, select, and collate the material points, of that which hath been said; and to give the rule or sentence”, Essay on Judicature, SEH, VII, 507.
The *Lexicon Juridicum* of Johannes Kahl, published in 1612, collects over forty entries on the term *certum* and its cognates. This semantic wideness reveals the relevance as well as the complexity of early-modern legal certainty. The ample spectrum of the meanings of legal certainty covered by Kahl includes the senses that, I suggest, were assumed by Bacon. At least roughly speaking, Bacon’s ideas on legal certainty concerning law and concerning facts do not seem to be either original or innovative. They rather reflect longstanding common assumptions and claims of civilian and common lawyers. The polysemy of legal certainty elicits a semantic net, a cluster of meanings that are sometimes overlapping and sometimes contrasting. To which extent are Bacon’s notions of legal certainty concerning laws and concerning facts coincident?

First of all, it seems remarkable that absolute certainty is assumed as an ideal unachievable in practice, out of the reach of human mind. In the case of law, the absolute certainty would be secured by a self-evident text that needs no interpretation. The absolute certainty concerning legal facts would be that facts were directly experienced by juries. Secondly, criteria of coherence (internal and external consistency) and precision (determination, fixity) are both attached to certain facts and certain laws. Roughly speaking, the certainty of laws as well as the certainty concerning facts involves, thus, degrees, coherence and precision.

Remarkable differences become apparent as one looks at the metaphysical and moral assumptions that lay behind these common traces. The certainty of law is grounded on the main supposition that law is rational and universal, founded on justice and equity. Given that the certainty of laws is directly tied to the limits of human language, it might be qualified as a linguistic matter. As we have seen, Bacon held that a good law should be “certain in exposition” (*intimatione certa*). Ideal certainty of law demands that words have the capacity to describe in a clear and manifest way the intrinsic rationality of the law. In so far as the perfect certainty of laws is out of reach, Bacon sought supplements to mend this fault mainly by means of the systematization of the laws and the compilation of maxims, according to the designs of his law reform. The systematization yields order and coherence to the otherwise chaotically disposed particulars laws. At the same time, the legal maxims provide a framework that controls legal interpretation. For a law to be certain, no proof but interpretation is needed. In so far as law is rational and fixed, interpretation is expected to reflect the permanent, wise, and consistent ends intended by it. Whereas in the case of law, certainty rests ultimately on interpretation, in the case of facts certainty results from the process of weighing up proofs through different kinds of empirical evidence.

However, the proofs for legal facts are far from the rational framework of law. Changing behaviors and circumstances make impossible any appeal to an irremovable universal rationality in human affairs, so there is no fixed framework from which the certainty of facts ought to be evaluated. Consequently, the quest for the certainty concerning legal facts presupposes the contingency typical of human will. Of course, expectations about the regular human behavior played an important role in the establishing of facts, to the extent that moral certainty can be described as a kind of certainty which is characterized by expectations about human behavior. That sense of moral certainty is assumed in legal trials of facts, for instance,

---

when testimonies of trustworthy people are expected to be true, so they yield certainty to jurors’ conscience. But this kind of certainty is only about testimonies, and testimonies are mere intermediary between facts and fact-finders. The fact itself still remains out of reach, entangled in the contingency of human behavior and far away from the “linguistic” certainty of the law.