

Burden of Proof: Degrees of Belief

J. P. McBaine*

"Nobody can be ignorant, that belief is susceptible of different degrees of strength, or intensity." Jeremy Bentham, *A Treatise on Judicial Evidence* [London, 1825] p. 40.

NO LAWSUIT can be decided, rationally, without the application of the commonplace concept of burden of proof¹—the duty to persuade—or as is sometimes otherwise stated the risk of non-persuasion.² Nor can any legal system be praised for practicability if there exists vagueness, uncertainty or confusion as to the scope or extent of the burden, or if the language commonly employed to describe its scope or extent is not easily comprehensible to those whose duty it is to determine whether the burden has been sustained.

If Peters sues Davis for a debt of \$100.00 which Peters alleges is owing because he lent that sum of money to Davis, and Davis denies borrowing any money from Peters, a rational disposition of the dispute cannot be made unless a determination be made as to which of the two litigants has the duty of persuading the judge, or the jury, if there is a jury, as to what has transpired. A simple example is used because it is believed that some of the problems involved can be discussed to better advantage by supposing a simple state of facts. The problems are the same although there are many issues in the lawsuit and the burden of proof or persuasion is upon one litigant as to some of them and upon his opponent as to others. If the supposed case is tried by a judge, without a jury, a judgment could be rendered by him without a conscious determination on his part of which of the litigants had the burden of persuading him as to what occurred in the supposed money transaction. If, however, he decided the suit without any reference to the burden of proof, the judgment would not be wise and just. Certainly a legal system which would take no account of whose obligation it is to persuade the trier of the

*Morrison Professor of Municipal Law, University of California.

¹ The term "burden of proof" in the texts and judicial decisions is used in two senses. Primarily it is used to describe the duty of a litigant to persuade the judge or the jury that the facts he asserts exist or have existed. The term is also sometimes used to describe the duty of a litigant to produce evidence of an asserted fact. 9 WIGMORE, EVIDENCE (3d ed. 1940) §§ 2485, 2487, hereafter cited as WIGMORE. In this essay the term is used in former or primary sense.

² *Ibid.* §2485.

facts would be a crude one, woefully lacking in reasonableness and wisdom. In modern society such a system would soon break down completely.³

In the hypothetical case stated as to which party should have the duty to persuade, there are obviously two alternatives. By rule of law the burden of persuasion may be placed upon Peters to establish the proposition, which he asserts, that Davis owes him \$100.00, or it may be put upon Davis to establish that he does not owe Peters anything. Our rules of law are neither uncertain nor conflicting as to who has the burden of proof or persuasion in this simple problem. The burden of persuasion is upon Peters. He, the plaintiff—the complaining party—has the obligation of convincing the judge that Davis owes him \$100. Peters has the risk of non-persuasion. Davis has no duty to persuade the judge that he does not owe Peters any sum of money. He has no risk of non-persuasion. By rule of law this burden is placed upon Peters because the courts have concluded that it is just and reasonable⁴ that a litigant who seeks the aid of a court to compel a fellow man to pay him a sum of money should not obtain that aid—a judgment—unless he persuades the judicial tribunal that the person whom he is suing has failed or refused to perform a legal duty which he should have performed. Broadly speaking a plaintiff who asserts that a defendant has not discharged obligations legally imposed upon him must carry the burden of proving the existence of the facts which impose the legal liability which he asserts. In solving this problem we must also have a rule which furnishes a solution where the evidence is such that the state of mind of the trier or triers of the fact is in equilibrium. In the case supposed, it may happen, after thoughtfully weighing the testimony of Peters and his witnesses and documents and the testimony of Davis and his wit-

³ See *ibid.* where he points out that if P attempts to sell property to M, who has money available, and D attempts to persuade M not to buy P's property, that P has the burden of persuading M to part with his money, that the risk of M's non-action is upon P. If M is not persuaded P doesn't get M's money. When there is a request to have action taken there exists the risk of non-persuasion. Speaking of the situation where action is desired from a judicial tribunal he makes this observation: "What, then, is the difference, if any, between this risk of non-persuasion in affairs at large and the same risk in litigation? In litigation, the penalty is of course different; the action which is desired of M is the verdict of the jury, the decree, order, or finding of the judge or some other appropriate action of the tribunal. But so also the action differs in other affairs, according as M is an investor with money to lend, or an employer with a position to fill, or a friend with a favor to grant."

⁴ THAYER, *PRELIMINARY TREATISE ON EVIDENCE* (1898) 370; 9 WIGMORE, *op. cit. supra* note 1, §2488.

nesses and documents, that the trier or triers of the fact conclude that he or they cannot decide whether the facts creating a debt do or do not exist. A rule of law must exist which will control the decision when the judge or the jury is in this dilemma.⁵

It is also true in a sound legal system that there must exist a test by which it may be ascertained whether a fact exists or does not exist. Some measure or amount of persuasion must be required. Some degree of belief must be reached by those whose duty it is to find the facts. It is just as essential that this aspect of the problem be settled as it is that we settle the broader question as to who has the burden of persuasion, who loses if the burden is not successfully carried. The purpose of this essay is to consider the extent or degree of persuasion imposed upon litigants by rules of law, or, stated another way, the degree of belief which the fact finder or finders must have.

When a lawsuit is tried by a judge and a jury, the fact finding problems are the same. The necessity, however, for precise ideas and understandable expression of them becomes more apparent when we have a jury. The judge in cases tried before him and a jury must inform the jury about these matters, must give them correct and explicit instructions to guide and control them in their task of fact finding. The judge in jury cases cannot, if counsel are alert, avoid the responsibility of formulating correct ideas about these problems and of giving them accurate expression though he may avoid committing himself where there is no jury. Expression of correct ideas in jury cases as to when they should find that assertions of fact are true is no easy task. A cursory examination of the reported decisions of any American jurisdiction will support this statement.

These, however, are elementary problems that affect all lawsuits. They should be so thoroughly explored and so definitely settled that they cause no further trouble for trial and appellate courts.⁶ The common law system at this stage of its long and useful life should not be in an unsatisfactory state as to elementary questions. Can

⁵ *Winans v. Attorney General H. L.* [1904] A. C. 287. In this case the learned Lord Chancellor, after observing that he could reach no satisfactory conclusion as to a disputed question of fact, said: "... the law relieves me from the embarrassment which would otherwise condemn me to the solution of an insoluble problem." *Gentes v. St. Peter* (1933) 105 Vt. 103, 163 Atl. 569. For other cases see 32 C. J. S. §1019.

⁶ The writer does not entertain the idea that the final word on the subject will appear in this essay. It, however, is hoped that the interest of the bar may be aroused and that by further study improvement will result in this aspect of American procedure which is long overdue.

anyone, who has carefully read the decision, say that the law as to the degree of belief required for fact finding in civil and criminal cases is in a satisfactory condition? We should no longer regard these matters as problems which we have not solved, although we may admit without apology that we have not been able to reach a satisfactory solution of many difficult questions of law. It is even not surprising that we cannot evolve a theory for the determination of the related question of where the burden of proof should be placed as to all the issues that may be raised in all the lawsuits which are tried in our courts; nor surprising that we disagree as to which litigant has the burden of proof upon issues of common occurrence. There is, for example, room for reasonable difference of opinion, in a suit upon a note which upon its face shows that it has been altered, as to whether the burden is upon the plaintiff to prove that it was not altered by him or upon the defendant to establish that it was altered by the plaintiff without defendant's consent.⁷ Maybe there is no perfect solution of this and similar problems.

Generally speaking the prevailing attitude is that the courts recognize three types of burdens of persuasion which must be borne by litigants in civil actions and in criminal prosecutions.⁸ The courts commonly say that in most civil actions the party who has the burden of proof must prove the existence of the facts upon which he relies by a preponderance of the evidence.⁹ The courts also commonly state that as to some issues of fact in civil cases the litigant who asserts their existence must prove them by clear and convincing evidence, or they use similar expressions.¹⁰ In criminal prosecutions it is commonly asserted that the burden is upon the prosecution to prove beyond a reasonable doubt all elements of the crime of which the defendant is accused.¹¹ This heavy burden also is sometimes imposed in civil actions. It seems quite sensible that the courts should recog-

⁷ *First National Bank v. Ford* (1923) 30 Wyo. 110, 216 Pac. 691, where the decisions are reviewed. See *McCusker v. McEvey* (1870) 11 Am. Rep. 295; *Wheeler v. Young* (1903) 76 Conn. 44, 55 Atl. 670, and a note 16 CALIF. L. REV. 341, for a problem in the field of property law where no apology is needed for the existence of conflicting decisions.

⁸ 9 WIGMORE, *op. cit. supra* note 1, §§ 2497, 2498; *Williams v. Blue Ridge Bldg. & Loan Ass'n* (1934) 207 N. C. 362, 177 S. E. 176.

⁹ 9 WIGMORE, *op. cit. supra* note 1, §2498. See cases cited in 32 C. J. S. §1021.

¹⁰ 9 WIGMORE, *op. cit. supra* note 1, §2497(3). See also cases cited in 32 C. J. S. §1023.

¹¹ 9 WIGMORE, *op. cit. supra* note 1, §2497; UNDERHILL, *CRIMINAL EVIDENCE* (4th ed. 1935) §25.

nize the wisdom and fairness of degrees of persuasion and belief although difficulty may be involved in determining in the civil cases what degree of persuasion should be required as to various issues. We should not, however, it is strongly believed, have uncertainty, conflict and confusion in our legal system as to what are these three degrees of persuasion and belief or how they should be adequately expressed in instructions for a jury.

Much of the confusion occurs from a failure to agree upon the basic ideas involved. The courts, too often, fail to realize that certainty as to what has happened cannot be ascertained from the testimony of witnesses or other evidence of acts. The frailty of man is such that certainty in the field of fact finding is impossible. An attempt to find out what has transpired involves correctness of perception, reliability of memory and ability to describe what was seen or heard.¹² There are also certain generic human traits respecting testimony which affect its probative value such as the age, sex, intelligence, character, temperament, emotion, bias, experience, etc., of the witness.¹³ Man's imperfections, which everybody knows exist, make absolute perfection or certainty unattainable in the field of fact finding. Those who administer the judicial process are not in the favorable position which scientists sometimes occupy in some realms of the physical sciences. The chemist and the physicist in many areas of knowledge can accurately ascertain facts. Judges and juries, however, must be content with less than complete accuracy in the realm of fact finding. They should of course make every reasonable effort to attain accuracy, but, no matter what they do, they cannot, for the reasons suggested, be absolutely sure¹⁴ that they have found the facts, certainly ascertained what has occurred; nevertheless they must come to some conclusions respecting what has occurred in order to discharge the duties imposed upon them.

The only sound and defensible hypotheses are that the trier, or triers, of facts can find what (a) *probably* has happened, or (b) what *highly probably* has happened, or (c) what *almost certainly* has hap-

¹² WIGMORE, *THE SCIENCE OF JUDICIAL PROOF* (3d ed. 1937) §171.

¹³ *Ibid.*, §172.

¹⁴ JEVONS, *PRINCIPLES OF SCIENCE* (Am. ed. 1874) 224. Introducing the discussion of probability the author states: "The subject upon which we now enter must not be regarded as an isolated and curious branch of speculation. It is the necessary basis of nearly all the judgments and decisions we make in the prosecution of science, or the conduct of ordinary affairs. As Butler truly said, 'Probability is the very guide of life.' Had the science of numbers been developed for no other purposes, it must have been

pened.¹⁵ No other hypotheses are defensible or can be justified by experience and knowledge.

In the ordinary civil suit it should not be sufficient to instruct a jury that it is incumbent upon the litigant with the burden of proof to establish by a "preponderance of the evidence" the facts upon which he relies, although the jury is told that preponderance of the evidence means not the number of witnesses¹⁶ or the amount of evidence produced but evidence which has greater weight or convincing power than the evidence which supports the assertions of fact of his opponent. The jury by such an instruction would not be informed as to the amount of belief which they should have in order to find for the litigant upon whom has been placed the burden of persuading them of the truth of the facts which he asserts. Nor by their discussion in the jury room and by their own reasoning¹⁷ about their duties are they likely to arrive at the conclusion that it is incumbent upon the litigant, whom the judge has instructed them has the burden of proof, to establish the facts to be more probably true than false. The instruction commonly given by the judge to the jury speaks of and emphasizes the weight of the evidence. It does not, as it should do, direct the attention of the jury to the degree of belief which the proponent of the proposition must produce in their minds before he is entitled to a finding favorable to him. The degree of belief which

developed for the calculation of probabilities. All our inferences concerning the future are merely probable, and a due appreciation of the degree of probability depends entirely upon a due comprehension of the principles of the subject. I conceive that it is impossible even to expound the principles and methods of induction as applied to natural phenomena, in a sound manner, without resting them upon the theory of probability. Perfect knowledge alone can give certainty, and in nature perfect knowledge would be infinite knowledge, which is clearly beyond our capacities. We have, therefore, to content ourselves with partial knowledge—knowledge mingled with ignorance, producing doubt."

¹⁵ See the sterling essay by Morgan, *Instructing the Jury Upon Presumptions and Burden of Proof* (1933) 47 HARV. L. REV. 59, 66.

¹⁶ WIGMORE, *op. cit. supra* note 12, §177; 8 WIGMORE, *op. cit. supra* note 1, §2036.

¹⁷ See the discussion *Five Types of Decision* by William James. 2 PRINCIPLES OF PSYCHOLOGY (1910) 531. He says that some people feel that in any event things are sure to turn out sufficiently right; that they grow tired of hesitation and inconclusiveness and that the time comes when even a bad decision is better than no decision at all; that some accidental circumstance supervening upon mental weariness upsets the balance in the direction of one of the alternatives.

It is not too much to hope that a proper test for fact finding can do much to prevent this type of decision making. Surely there is a much greater chance to prevent it if a clear guide is furnished the triers of fact than if an unintelligible guide is given to them. A guide which is not understood is likely to induce a state of mind where one conclusion seems as good as another.

should exist before it may be concluded that an assertion of fact is true is the element in the fact finding problem which must be emphasized and made plain. A clear guide should be furnished to them to enable them to discharge their difficult task of fact finding with which often they have had little or no experience. No sound legal system should do less.

When juries are instructed that they should find for the litigant with the burden of proof if they find that the evidence before them supporting the facts which he asserts is stronger or more convincing than the evidence supporting his opponent's assertions, the error is usually recognized and condemned by the appellate courts.¹⁸ This test for fact finding so obviously falls short of a reasonable goal that its fallacy is detected. No prudent man would act as to a matter of importance to him if, after talking with several of his acquaintances, his state of mind is: "I think I will make this investment since what I have heard favorable to it impresses me more than what I have heard against it." People of prudence do not take important action involving their self interests when they know no more than that the evidence for taking an important step is stronger for taking it than it is for not taking it. Before acting they entertain stronger convictions. More reason exists for instructing a jury in the supposed lawsuit of *Peters v. Davis* that they should not return a verdict which will award a sum of money to Peters, which Davis must pay, merely because the evidence which they have heard is stronger that Davis owes Peters the money than it is that Davis does not owe Peters any money, than exists for one who is acting about his own affairs not to make an important decision merely because there is more evidence why he should act than there is why he should not act. It is conceded that the law could be that the litigant with the burden of proof should win the issue if his evidence is stronger than his opponent's evidence, but it is asserted that such a rule would be an unwise one

¹⁸ *Dunbar v. McGill* (1887) 64 Mich. 676, 31 N.W. 578. Champlin, J. said: "We think this instruction was misleading. It leaves out of view an important element to be considered in the application of the preponderance of probabilities; and that is, the testimony introduced tending to show that these were plaintiff's sheep must have been of such character and weight as satisfied the jury that the sheep which mingled with defendant's, and which it was claimed defendant converted, were the property of the plaintiff. This question did not depend upon whether there was more evidence to show that these were Dunbar's sheep than that they were not his sheep, but upon the question whether there was sufficient evidence to satisfy the jury that they were his sheep." See also *Anderson v. Chicago Brass Co.* (1906) 127 Wis. 273, 106 N.W. 1077; *Ergo v. Merced Falls Gas & Elec. Co.* (1911) 161 Cal. 334, 119 Pac. 101.

and one which would produce bad results. The least that the law should require, before an award of money to Peters from Davis should be made, is that the trier of the facts should be convinced that it is more probable that Davis owes Peters a sum of money than it is that he owes him nothing.

It would also be unwise and unjust to adopt and apply a test for fact finding which places a burden upon Peters, before he is entitled to an award of a sum of money from Davis, of convincing the judge or a jury that it is *certain* that Davis owes Peters a sum of money. Peters cannot carry such a burden because certainty in this type of dispute is not attainable. A rule of law which required that certainty must exist before one person can be compelled to pay money to another person would be utterly unpracticable. No one could ever get relief in court under such a rule of law if it were honestly enforced. The rule might produce good results, sometimes, but if awards were so made the rule would have to be ignored. Some courts in some cases, apparently, have believed that certainty is attainable, have believed that before a litigant in the ordinary civil suit, who has the burden of proof, is entitled to a verdict or a finding of fact in his favor he must convince the judge or the jury, as the case may be, of the certainty of the facts upon which his demand is based.

There seems to be some authority for the view that in the ordinary civil action the jury should be instructed that they must find that the facts asserted are true; that it is error to instruct them that they should return a verdict for the litigant with the burden of proof if they find that it is more probable than not that they are true. One able court,¹⁹ speaking through an able judge, ruled, in an action upon a note where one defense was alteration, that a proposed instruction was properly refused, which told the jury that they should find for the defendant if they should find that "it is more probable that such changes or alterations have been made in the instrument after it was signed by the deceased and without his knowledge and consent, than it is that such alterations and changes were made at or about the time that he signed the instrument", etc. The court said, "The

¹⁹ *Lampe v. Franklin American Trust Co.* (1936) 339 Mo. 361, 96 S.W. (2d) 710, 107 A.L.R. 465. For a later and different view in this jurisdiction of the burden of persuasion see *Seagor v. New Central R. R. Co.* (1942) 349 Mo. 1249, 164 S.W. (2d) 1249, 147 A.L.R. 372. Here the court criticized an instruction which stated that the party with the burden must prove his assertions "to your satisfaction by a preponderance or greater weight of evidence." In this case the conclusion was that the burden imposed was too heavy.

trouble with this statement is that a verdict must be based upon what the jury finds to be facts rather than what they find to be 'more probable.' . . . They must not attempt to base a verdict," it was said, "upon what facts may be 'more probable,' if they cannot decide what facts are true."

Other courts have repudiated the idea that certainty is attainable. Another able court²⁰ speaking through an able judge has ruled that fact finding is not a search for certainty. In an action to recover usurious interest paid, a trial court had found for the plaintiff finding that the defendant to whom a note was transferred "probably knew of the defect in the note" when he acquired it. The plaintiff in the case had the burden of establishing knowledge of the usury by the defendant. The appellate court held that the finding was sufficient. The court said:

"In the ordinary civil case, the issues are decided by a balance of probabilities. *Fuller v. Rounceville*, 29 N. H. 554, 563. When the party having the affirmative of the issue has established the probable truth of his contentions, he has met the burden resting upon him. A finding that the defendant probably knew the defect in the note is a finding that the plaintiff, upon whom the burden rested, had satisfied the trier of fact that the defendant knew the fact. No advantage is perceived in the use of the more cumbersome expression."

There exists a radical difference in thought between these two decisions upon a basic question which arises in all civil suits of this type. It is scarcely necessary to say, in view of what has been said previously, that the latter decision should be approved, the former disapproved. The decision first mentioned, a Missouri case, is based upon the fallacy that facts can certainly be ascertained; the second, a New Hampshire case, is based upon the sound idea that certainty in the fact finding process cannot be attained; that fact finding at most is only a process of determining what probably, in various degrees, has happened. One test for fact finding is fanciful, the other realistic—and there is no place in the fulfillment of the practical obligation which society has undertaken of settling disputes in the court room for fallacies or spurious principles of logic.

²⁰ *Moffie v. Slawsky* (1915) 77 N.H. 555, 94 Atl. 193. See also *Sargent v. Massachusetts Accident Co.* (1940) 307 Mass. 246, 29 N.E. (2d) 825; *Judd v. H. S. Coe & Co. Inc.* (1933) 117 Conn. 510, 169 Atl. 270; *Mutual Life Ins. Co. v. Springer* (1937) 193 Ark. 990, 104 S.W. (2d) 195; *Murphy v. Waterhouse* (1896) 113 Cal. 467, 45 Pac. 866.

A glance at the digests, encyclopedias and texts will reveal the conflict, uncertainty and confusion which now exist in the decisions respecting the proper method of instructing a jury as to the degree of belief which they must have before they should find that the facts have been established by the litigant whose duty it is to establish them. Qualifications of language and ambiguous phrases in instructions stating that the litigant who has the burden of proof must establish the facts by a preponderance of the evidence have caused no small amount of trouble for both litigants and appellate judges. "Satisfaction of the jury," "reasonable satisfaction," "convince their minds" and similar expressions have been the subject of much judicial conflict²¹ and hair splitting. Nothing is to be gained by a detailed discussion of these cases. The discussion would be profitless and reading it would be both profitless and wearisome. The body of the law will be healthier and stronger when they no longer have current significance but have become legal history, only.

When we examine another group of civil cases where the courts have held that certain issues must be proved by something more than a preponderance of the evidence, *e.g.*, by "clear and convincing evidence" or by a similar amount of evidence, and there are many such

²¹ 9 WIGMORE, *op. cit. supra* note 1, §2498. See also a note 147 A. L. R. 380: "Use of the word 'Satisfaction' or a derivative in instructions in civil cases relating to the degree or amount of proof."

See 32 C. J. S. §1021 for many cases dealing with the question whether instructions are correct which contain the phrase, "satisfies," "thoroughly satisfies," "entirely satisfies," "reasonably satisfies," "reasonably certain," "conviction," "clear conviction," "convinces," etc.

Some idea of the "futile grist," to use Wigmore's phrase, (9 WIGMORE, *op. cit. supra* note 1, at 318) may be had by reading the following decisions:

The Alabama court has held that an instruction which placed upon a litigant the burden of establishing the facts "to the satisfaction of the jury by a preponderance of the evidence" was erroneous. *Southern Railroad Co. v. Riddle* (1900) 126 Ala. 244, 28 So. 422. It was said that the term "reasonable satisfaction" should have been employed; that the former term imposed too great a burden upon the litigant. In another Alabama case, *Nelson v. Belcher Lumber Co.* (1936) 232 Ala. 116, 166 So. 808, the court drew a distinction between instructions which read "reasonably satisfies the jury by a preponderance of the evidence" and "reasonably satisfies the jury by the evidence" saying that the former instruction may properly be refused because misleading, that the latter description of the burden is the correct one. In another case, *Lacey v. Dealon* (1934) 228 Ala. 308, 153 So. 650, this court condemned the use of the word "believe" in burden of proof instructions. It was said that the instruction exacted an improper degree of proof, that "reasonable satisfaction" was a sufficient degree. In *Harrison v. Emens* (1938) 235 Ala. 319, 179 So. 219, this court also said that an instruction was erroneous which re-

quired the plaintiff (who had the burden of proof) to prove his case by a preponderance of the evidence. The instruction read: "I charge you that the burden rests on the plaintiff to establish by a preponderance of evidence that the original attachment was wrongful." It was said that the instruction imposed upon plaintiff a greater burden than the law required, that all that is required is that "the evidence must reasonably satisfy the jury." It was concluded that a new trial was properly awarded because of the instruction which was given to the jury. These citations should be sufficient to demonstrate that the law of Alabama is in a most unsatisfactory state. It is not difficult to imagine the fear and trepidation of some Alabama lawyers, and trial judges, when they write and give instructions on this phase of an ordinary civil suit.

In California the court held in *Estate of Ross* (1919) 179 Cal. 629, 178 Pac. 510, that an instruction defining preponderance of the evidence as "that amount of evidence which produces conviction in an unprejudiced mind" was erroneous, that it placed too great a burden upon the party with the burden of proof. In another California decision, *Hudson v. Southern California R. Co.* (1907) 150 Cal. 701, 89 Pac. 1093, the majority of the court criticized an instruction which told the jury that it was necessary for the party with the burden of proof to establish the facts "to your satisfaction and by a preponderance of the evidence."

The Wisconsin court has had no little difficulty with the question. In *Ogodiski v. Gara* (1921) 173 Wis. 380, 181 N. W. 231, the court in advising the trial court as to how to instruct the jury upon a new trial, said that the instruction which was given at the first trial, that the jury should be "satisfied to a reasonable extent," should have read "satisfied to a reasonable certainty." In *Sullivan v. Minneapolis St. P. & S. Ste. M. R. Co.* (1918) 167 Wis. 518, 167 N. W. 311, where the trial court had instructed the jury that the term burden of proof meant that it was incumbent upon the party who had the burden to establish the truth "to your satisfaction by the preponderance of the credible evidence," it was held that the instruction was not open to the objection that it did not include the phrase "to a reasonable certainty."

The Arizona Supreme Court held in *Wilkinson v. Phoenix R. Co.* (1925) 28 Ariz. 216, 236 Pac. 704, that an instruction in an ordinary civil action which told the jury that the party with the burden had the duty of establishing the facts "to your satisfaction by a preponderance of the evidence or greater weight of the evidence" was erroneous. The court said this was a correct statement of the burden when the issue is fraud but not in the ordinary case, e.g. a negligence case. It was said "The jury must be guided by a preponderance of the evidence even though it may not be satisfactory." In Iowa an instruction which defined the burden of proof as "the greater weight of the testimony, that is the testimony which satisfies your mind that it is true," was held improper. *Heacock v. Baule* (1933) 216 Iowa 311, 249 N. W. 437. In *Callan v. Hanson* (1892) 86 Iowa 420, 53 N. W. 282, the court held that an instruction was not erroneous which read: "if from the preponderance of the evidence you are satisfied." In *Washington in Alveson v. Kansas L. Ins. Co.* (1938) 196 Wash. 91, 82 P. (2d) 149 "to your satisfaction by a preponderance of the evidence" was held to be a proper guide. The court relied upon *Callan v. Hanson*, *supra*. For the Texas law see the excellent text *McCORMICK and RAY, TEXAS LAW OF EVIDENCE* (1937) §30. The authors state: "The definitions employed are frequently confusing and often more or less contradictory." See a note (1928) 12 MINN. L. REV. 660.

No further citations and quotations can make clearer the proposition that the law is in an unhealthy state. Wigmore perhaps didn't exaggerate when speaking of a decision on this question, he said: "A wondrous cobweb of pedantry is here woven to occupy the jury's simple mind and the trial judge's tongue." 9 WIGMORE, *op. cit. supra* note 1, at 326.

issues,²² the conflict, confusion, uncertainty and ambiguity is also alarming. Many phrases have been coined to express this amount of persuasion, or degree of belief, *e.g.*, "clear cogent and convincing," "clear satisfactory and convincing," "clear precise and indubitable," "clear and irresistible," "convincing beyond reasonable controversy," etc. As to certain issues, for one reason or another, the courts have concluded that it is fair and just to require a litigant to carry a somewhat heavier burden of persuasion than litigants are required to bear as to the issues in most civil actions. No fault is being found with this conclusion. It seems good judgment—wise and just—, for example, to impose upon a litigant who asserts that a writing which appears upon its face to be a deed to land should have the duty of persuading the trier or triers of the fact that in reality it was not a deed but was only a mortgage.²³ There should, however, be a clear understanding and definition of what is meant by "clear and convincing evidence." Much of the trouble in this class of cases, also, it is believed, is caused by the use of phrases which describe the quality of the evidence rather than the state of mind of the judge or the jury who must determine, for example, whether the instrument conveyed the land or only encumbered it with a mortgage. Here also the factor, the degree of belief, which should be emphasized and made clear is omitted. The rule should be, as to these issues, that belief as to truth of the facts asserted should be strong. The existence or non-existence of facts cannot be established with absolute certainty. The proponent should be compelled to bear the burden of inducing persuasion to a relatively high degree. How can this be done is of course a fair question—a question which must be given a practicable answer. The answer submitted is the same type of answer that was given to the question raised as to the issues in the ordinary civil case where the preponderance of the evidence formula is deemed applicable. In this group of cases the courts have decided, not unwisely, that a litigant who asserts certain facts must carry a greater burden than

²² *Ibid.*, §2493. The author lists, among others, the following issues: fraud; undue influence; parol agreement to bequeath by will; mistake sufficient to reform an instrument; whether a deed absolute is a mortgage, etc. See also 32 C. J. S. §1023 for cases from many American jurisdictions, and cases cited in 20 AM. JUR. §1253.

It is not the purpose of this essay, as has been stated, to discuss what issues must be sustained by one degree of persuasion rather than by another.

²³ *Couts v. Winston* (1908) 153 Cal. 686, 96 Pac. 357; *Beverly Hills National Bank v. Martin* (1939) 91 P. (2d) 94; *Yelvington v. Overstreet* (1939) 198 Ark. 486, 129 S. W. (2d) 231; *Mill v. Daugherty* (1941) 63 Idaho 12, 115 P. (2d) 759.

is required ordinarily in civil suits and lesser burden than the state must carry in a criminal prosecution. The burden then should be that the proponent of these issues must establish that the facts, which he asserts, are highly probably true. It is recognized that it is impossible to define with precision the word "highly." We cannot so easily frame a rule for measurement of mental state as we can devise a method for finding whether a vessel which contains some water is 55 or 75 per cent filled with this liquid. The most that can be done, in these cases, which is the least that should be done, is to adopt a rule that the litigant who bears the burden must induce belief in the minds of the judge or the jury that the facts which he asserts are not merely probably true, but that they are highly probably true, yet not require him to discharge the greater burden of persuading them that they are almost certainly true, true beyond a reasonable doubt, or are certainly true. The litigant upon whom this burden of persuasion is placed should lose if the trier or triers of the fact are not convinced upon all the evidence that the facts upon which his claim depends or his defense rests are highly probably true. The risk of non-persuasion is his, and when the trier or triers of the fact are not persuaded to the high degree to which they must be persuaded the loss of the issue falls upon him. As was previously stated the decisions relating to the meaning of "clear and convincing evidence" and similar expressions are confused and confusing.²⁴

²⁴One court approved an instruction which read: "the burden of proving that (stating the facts) is upon the defendant * * * and these facts must be established by clear and convincing proof." *First National Bank v. Ford* (1923) 30 Wyo. 110, 216 Pac. 691, 31 A.L.R. 1441. The Oregon court said that the issue "should be clearly established by a preponderance of the evidence." *McKinney v. Hindman* (1917) 86 Ore. 545, 169 Pac. 93. The Supreme Court of Illinois in *New York Central R. R. Co. v. Kinsella* (1927) 324 Ill. 339, 155 N.E. 284, said that although the issue must be established by clear and convincing proof this "does not militate against the rule that in civil cases a preponderance of the evidence is all that is necessary to support a verdict." The West Virginia Supreme Court in *Seymour v. Alkire* (1899) 47 W. Va. 302, 34 S.E. 953, said: "To show a mistake in a settlement or instrument, the evidence must be clear and convincing beyond reasonable controversy." The Supreme Court of Arkansas in *Frazier v. Loflin* (1940) 200 Ark. 4, 137 S.W. (2d) 750, said that the quantum of evidence "must rise above a preponderance of the testimony." It was said that the evidence must be "clear, cogent and convincing." In another Arkansas case, *Sheffield v. Baker* (1940) 201 Ark. 527, 145 S.W. (2d) 347, the court said, "It must be so clear, satisfactory and convincing as to be substantially beyond doubt . . ." The same court in *Bork v. Beckell* (1940) 200 Ark. 1189, 137 S.W. 898, said that the evidence "must be clear, convincing, and decisive." The Pennsylvania Supreme Court in *Gilberti v. Coraopolis Trust Co.* (1941) 342 Pa. 161, 19 A. (2d) 408, said that the evidence "must be clear, precise and indubitable." The Pennsylvania Supreme Court in *Weightman v. Weightman* (1941) said that "the evidence must be clear, precise, and indubitable." The Missouri Supreme

In the third group of cases, almost but not always,²⁵ criminal prosecutions, where the degree of belief is stated to be belief "beyond a reasonable doubt", the traditional approach is not the same as it is in civil actions where the rule is stated to be proof by a preponderance of the evidence, or by the production of clear and convincing evidence. In criminal cases the extent or degree of belief of the triers of the fact is stressed, not the amount or quality of evidence. Belief beyond a reasonable doubt is a much more intelligible expression to laymen than the expressions that a litigant has the burden of establishing a fact by a preponderance or the greater weight of the testimony or by clear and convincing evidence. The former expression tells the laymen the degree of belief which they must have in order to find for the prosecution; the latter expressions direct their attention to the amount of evidence which must be produced by the bearer of the burden, not the degree of persuasion which must be induced to secure a favorable finding.

In the third group of cases, where the degree of belief must be extremely high, almost certain, or belief beyond a reasonable doubt, the law also is in an unsatisfactory state. The history of the development of this rule of law while interesting will not be traced. It has

Court in *St. Louis Union Trust Co. v. Busch* (1940) 346 Mo. 1237, 145 S. W. (2d) 410, said that the issue "must be proven by forceful, clear and conclusive testimony, which convinces beyond a reasonable doubt as to its truthfulness." For other expressions see the cases collected in 20 AM. JUR. §1253.

See *Stromerson v. Averill* (1943) 22 Cal. (2d) 808, 141 P. (2d) 732, discussed in 32 CALIF. L. REV. 74 and 17 SO. CALIF. L. REV. 333. A majority of the court held, although the issue had to be proved by clear and convincing evidence, that the question was not open upon appeal; that the question whether the evidence was clear and convincing was for the trial court. Traynor, J., dissenting, took the view that the appellate court had the power, and also the duty, to determine whether the evidence introduced showed that the facts to be established were "highly probable." Compare *Schneiderman v. United States* (1943) 320 U. S. 118, where the Court reversed the finding below which, it was concluded, was not sustained by clear and convincing evidence.

²⁵ See *In re Jones' Estate* (1939) 110 Vt. 438, 8 A. (2d) 631, 128 A. L. R. 704. The question in this case was the legitimacy of a child born in wedlock. See a note in 128 A. L. R. 707 for other decisions requiring proof beyond a reasonable doubt of illegitimacy. In this group of cases sometimes the phrase is "irrefragable" and "irresistible" (128 A. L. R. 719). See 32 C. J. S. §1024; 20 AM. JUR. §1254 and 9 WIGMORE, *op. cit. supra* note 1, §2498 for the citations of other civil actions where this degree of proof was required.

See Rule 703, MODEL CODE (Am. L. Inst. 1942). By this rule where it is established that a child is born to a woman while she is the wife of a specified man the party claiming that the child is illegitimate "has the burden of persuading the trier of the fact beyond reasonable doubt that the man was not the father of the child."

been admirably done by J. W. May, author of the well known treatise on criminal law.²⁶ It seems pretty certain that the reasonable doubt test appeared at the end of the eighteenth century.²⁷ The test was popularized by Starkie who expressed it as belief to a "moral certainty, to the exclusion of all reasonable doubt." This test was further strengthened and made acceptable to American courts by the charge of Chief Justice Shaw in a famous case, *Commonwealth v. Webster*, decided in 1850.²⁸ This definition of reasonable doubt has had a wide influence upon American judges, more influence perhaps than any other explanation of this, concededly, difficult question.

The rulings, however, in this field, are neither consistent nor satisfactory. A great modern American scholar, the late John H. Wigmore, said in the latest edition of his superb treatise on Evidence, "In practice, these detailed amplifications of the doctrine have usually degenerated into a mere tool for counsel who desire to entrap an unwary judge into forgetfulness of some obscure precedent, or to save a cause for a new trial by quibbling, on appeal, over the verbal propriety of a form of words uttered or declined to be uttered by the judge. The effort to perpetuate and develop these elaborate unserviceable definitions is a useless one, and serves today chiefly to aid the purposes of the tactician."²⁹

Indeed the trial judge is placed in an unenviable and undesirable position. An instruction unfavorable to the accused will result in a new trial or reversal upon appeal, results which, of course, should be avoided if possible. The rule of the law as to the degree of belief to return a verdict of guilty should be so well settled that no criminal conviction would be reversed because of an instruction upon burden of proof which is not sufficiently favorable to the accused. Nor should any trial judge because of fear of being reversed upon appeal be placed in a position where he will give an instruction which is too favorable

²⁶ See May, *Some Rules of Evidence: Reasonable Doubt in Civil and Criminal Cases* (1876) 10 AM. L. REV. 642.

²⁷ 9 WIGMORE, *op. cit. supra* note 1, §2497.

²⁸ 5 Cush. [Mass.] 295, 320. Chief Justice Shaw said: "It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty of the truth of the charge. The burden of proof is upon the prosecutor. All the presumptions of law independent of evidence are in favor of innocence; and every person is presumed to be innocent until he is proved guilty. If upon such proof there is reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal."

²⁹ 9 WIGMORE, *op. cit. supra* note 1, §2497.

to the accused, thereby enabling adroit counsel to secure an acquittal upon improper grounds.³⁰

The decisions contain various definitions of the term reasonable doubt, such as "doubt for which a reason can be given," "a doubt existing for reason," "a doubt which would cause a prudent man to hesitate in taking action upon an important matter," "a substantial doubt," "belief to a moral certainty," "an honest and substantial misgiving," "serious and well founded doubt," etc.³¹ Often negative expressions are employed to explain what is a reasonable doubt, such as "guilt need not be proved conclusively," "not a vague conjecture," "not a capricious and speculative doubt," "not an arbitrary doubt," "not a trivial doubt," "not a mere possible doubt," "not an imaginary doubt," etc.³² In view of the variety and inadequacy of the many attempts to define reasonable doubt perhaps the view frequently expressed that no explanation of the term is helpful to the jury,³³ has much to justify it. It is surely expedient.

The problem in this class of cases is also one of probabilities. The state cannot possibly demonstrate that it is absolutely certain that the accused committed the murder, robbed the bank, embezzled the funds or committed various crimes that are all too common in society. To place such a burden upon the prosecution would break down law enforcement. Unjust acquittals would result, and the convictions which would be secured would come from juries who did not honestly

³⁰ Judge May in his essay (note 25) stated "We all know that, when a criminal lawyer has to defend a case where the facts are all against him, his uniform and too often unfailing resource is the law. Upon this he falls back. The doctrine of 'reasonable doubt' is kept always in the front. The reports are ransacked for loose definitions by careless judges in insignificant cases. The extravagant and unsupported 'dicta' of text-writers, made perhaps in support of a theory of what the law ought to be, rather than as proof of what it has been authoritatively declared to be, are hunted up with untiring zeal. These are reenforced by a series of cases—fabulous and authentic—scattered through the musty annals of crime, in which it is said that innocent persons have been convicted. The whole mass of bewildering definitions, extravagant 'dicta,' astounding facts, or fictions, as the case may be, is then arrayed with greater or less skill, according to the ability of counsel, and paraded before the jury with pathetic solemnity. Of course, the object of all this is to confound and befog; to bring the jury into that state of amazement, apprehension, and uncertainty, which will disqualify them to deal calmly and rationally with the facts of the case before them . . ."

³¹ See cases cited in UNDERHILL, *op. cit. supra* note 11, §27; 20 AM. JUR. §1257; 23 C. J. S. §910.

³² Note 31, *supra*.

³³ State v. Robinson (1893) 117 Mo. 649, 23 S.W. 1066; People v. Steubenvoll (1886) 62 Mich. 329, 28 N.W. 883. For other cases see UNDERHILL, *op. cit. supra* note 11, §25.

believe that the facts constituting the crime had been proved to the point of absolute certainty.

The most that can be expected of the prosecution is that the facts upon which guilt depends shall be established as almost certainly true. "Almost certainly" true can be made somewhat clearer by explanation. The judge can point out to a jury that the phrase does not mean that the prosecution must prove that its assertions of fact are absolutely true. He can explain to them that the burden is a greater one than the burden of proving that the asserted facts are more probably true than false, that even a greater burden is imposed than the burden of establishing that they are highly probably true. The jury can be told that a reasonable doubt is not a possible doubt but merely a doubt as to whether the facts are absolutely certainly true.

It is freely conceded that the problem is a difficult one and that our vocabulary leaves something to be desired. The fact remains, nevertheless, that the problem exists, that some solutions are better than others, and that the best solution that can be made is the only solution with which the legal profession should be content.

It seems pretty clear that the rhetorical and flowery language commonly employed in instructions upon reasonable doubt should be eliminated. Words with doubtful or obscure meanings should be avoided. Plain words and phrases should be used which define the degree of belief which must exist; words and phrases which do not suggest a test of a nebulous or a mysterious nature. The phrases "moral certainty" and "abiding conviction" borrowed from Chief Justice Shaw's charge to the jury in the famous *Webster* case³⁴ should be replaced by simpler language, by words which express the idea of probability, all but certainty, and certainty.³⁵ Euphemisms are likely to be misleading.

³⁴ *Supra* note 28.

³⁵ See the interesting essay by William Trickett, *Preponderance of Evidence and Reasonable Doubt* (1906) X THE FORUM, Dickinson School of Law 76. He asks what is an abiding conviction? How long must this conviction exist? How can its longevity be estimated? What is moral certainty? Is it a different state of mind than conviction?

His questions are pertinent. The phrase moral certainty seems especially inappropriate. The word moral suggests a distinction between good and evil in relation to the actions or character of responsible beings. (6 ENG. DICT. (1908) Murray, 653.) "Conclusions in natural philosophy," said Tillotson, "are to be proved by a sufficient induction of experiments: things of a moral nature by moral arguments, and matters of fact by credible testimony." Tillotson, WISDOM OF BEING RELIGIOUS, 25; 6 ENG. DICT., Murray, 654. In a loose sense it sometimes means a degree of probability so great as not to admit of reasonable doubt; also that something is probable but not demonstrated. *Ibid.* To use the phrase moral certainty may convey the idea to the jury that absolute cer-

What has been written so far may have impressed the reader that the law in the United States is in a state of confusion and that some of the decisions are indefensible. If this is not the impression upon the reader's mind from this brief exposition, it is believed that a study of the many cases to which he has been referred in the footnotes will surely produce that belief. Improvement in the state of the law from one approach seems hopeless. It is too much to expect that some court or courts, in the near future, will likely write a decision, or a series of decisions, which will clarify the problem and that these decisions will be widely read and generally followed, that the fog will be lifted and the sun will shine. So many decisions have been rendered in all American jurisdictions, which have become precedents, that it is quite unlikely that they will be abandoned. Precedent in our legal system is a tenacious idea. In most jurisdictions there is a great deal of law on the questions discussed in this essay. Often the decisions in the same jurisdiction are conflicting, vague and confusing.

Looking at the problem from another angle, improvement is not hopeless. Changes, which will be betterments, can be brought about if, in the legal profession, there is the will to make them. The way for improvement is by legislation. Legislation is not only a way, it is the only way out of the wilderness. It is also believed that legislation is a practicable means of doing a sorely needed and important service. Statutes can and should be enacted which will result in substantial improvements. The measures of persuasion or degrees of belief in the three types of issues discussed can be described with reasonable accuracy so that the degrees may be understood by members of the bar, trial judges, juries and appellate judges. These statutes might also, advantageously, set forth instructions which should be regarded as sufficient upon each of the three degrees of belief which a trier or the triers of the facts must have in order to find the facts. That the task proposed is no easy one will be conceded. Descriptions of state of mind or belief are difficult to formulate. Words are hard to find which will describe them with the precision which we would desire to attain. "Words which should be the servants of thought are too often its masters." But so long as we include in the legal system the idea of degrees of belief, and surely the idea of some degree of

tainty is required which of course is not the degree of belief which must be induced to obtain a conviction. The phrase is inappropriate to express the idea that absolute certainty is not required but that the burden is sustained if it is almost certain that the accused committed the crime. If the word is used to indicate the seriousness of the belief, "honestly believe" is thought to be a better expression.

belief is indispensable, we must make our best efforts to define the ideas which we employ. Difficulties of the task of describing a degree of belief should not deter the legal profession from attempting a common sense description of that degree. As is aptly said by Right Hon. A. J. Balfour in his interesting book, *Foundations of Belief* (p. 234): "If we have to find our way over difficult seas and under murky skies without compass or chronometer, we need not on that account allow the ship to drive at random." Being strongly convinced from a study of the cases that the only way out of the discord of confused and confusing precedents is through legislation and, though perfection may not be reached even by legislation, but that substantial improvement can be attained by this means, the following statutes are suggested.

It is sincerely hoped that there will be sufficient interest by members of the legal profession in the proposed statutes to bring out a discussion of their weaknesses and shortcomings and suggestions for their improvement. The motive back of the attempt to frame them is to arouse an interest in enacting legislation. The idea is not entertained that improvements in them cannot be made. They are known not to be perfect but it is believed that they are suggestive of the proper methods of approach. Proposed statutes are therefore submitted which define the terms "Preponderance of the Evidence"; "Clear and Convincing Evidence"; and "Proof Beyond a Reasonable Doubt," together with instructions which are thought to embody expressions of the degrees of belief which are described in the proposed statutes.

- PREPONDERANCE OF THE EVIDENCE.³⁶ When the rule of law now is, or hereafter shall be, that a party to an action or proceeding has the burden of proving the truth of existence of facts by a preponderance

³⁶ In Georgia, GA. CODE (1933) §38-105, it is provided that "moral and reasonable" certainty is all that can be expected in legal proceedings and that in civil cases "the preponderance of evidence is considered sufficient to produce mental conviction." By §38-106 of the same code preponderance of evidence is defined as follows: "Preponderance of evidence defined.—By preponderance of evidence is meant that superior weight of evidence upon the issues involved, which, while not enough to wholly free the mind from a reasonable doubt, is yet sufficient to incline a reasonable and impartial mind to one side of the issue, rather than to the other."

The MODEL CODE OF EVIDENCE drafted by the American Law Institute provides Chapter I, General Provisions, Rule 1:

or greater weight of the evidence, his burden of persuasion is as follows:

The judge, if the judge finds the facts, or the jury, if the jury finds the facts, must believe that it is more probable that the facts are true or exist than it is that they are false or do not exist; but, it is not necessary to believe that there is a high probability that they are true or exist, or necessary to believe to a point of almost certainty, or beyond a reasonable doubt, that they are true or exist, or necessary to believe that they certainly are true or exist.

When instructing a jury upon the subject of proving an issue of fact by a preponderance or greater weight of the evidence, the court may read to the jury the following instruction, as to this burden, and no other or further instruction as to it need be given to them.

INSTRUCTION: The court instructs you that by the law of this state burdens of proving facts are imposed upon parties to lawsuits, and other types of legal proceedings, for the purpose of reaching wise and just decisions.

The court instructs the jury, wherever you have been instructed in other instructions in this case, that a party to this action has the burden of proving a fact or facts by the preponderance or greater weight of the evidence, that the burden of proof imposed upon that party is the following:

The burden is not a burden of merely producing a greater number of witnesses or a greater quantity of evidence. The burden therefore is not necessarily carried by the introduction of the greater number of witnesses or the greater quantity of evidence. A greater number of witnesses or a greater quantity of evidence are factors which you may take into account in determining whether the burden of proof has been carried. Neither the greater nor the lesser number of witnesses or quantity of the evidence is the sole test to be applied in determining whether the burden of proof, imposed by law, has been

"(3) 'Burden of persuasion of a fact' means the burden which is discharged when the tribunal which is to determine the existence or non-existence of the fact is persuaded by sufficient evidence to find that the fact exists.

"(4) 'Conduct' includes all active and passive behavior, both verbal and non-verbal.

"(5) 'Finding a fact' means determining that its existence is more probable than its non-existence. A ruling implies a supporting finding of fact; no separate or formal finding is required."

The MODEL CODE according to Rule I (1) is intended to cover civil actions, special proceedings and criminal prosecutions. There is no special reference to the burden of proof in criminal prosecutions or the burden often imposed in civil actions of proving facts by clear and convincing evidence.

carried because the burden so imposed is one of convincing your minds. Belief in the truth of assertions, therefore, is not to be reached by merely calculating the numbers of witnesses or by estimating the quantities of evidence.

The burden is not a burden of convincing you that the facts which are asserted are certainly true or that they are true to a high degree of probability.

The burden imposed is to convince you upon all the evidence before you that the facts asserted are more probably true than false.

If then upon consideration and comparison of all the evidence in the case you believe that it is more probable that the facts are true than it is that they are false you must find that the facts have been proved.

If, on the other hand, you believe that it is more probable that the facts asserted are false than it is that they are true, you will find that the party upon whom this burden of proof has been placed has not proved the facts.

Also, if you find that the probabilities of truth and falsity are evenly balanced; that it is just as probable that the facts are true as it is that they are not true, you will find that the burden of proof imposed upon him has not been carried, because he has not proved that the facts are more probably true than not true.³⁷

CLEAR AND CONVINCING PROOF. When the rule of law now is, or hereafter shall be, that a party to an action or proceeding has the burden of proving the truth or existence of facts by clear and convincing evidence, or by similar evidence, the burden of persuasion is as follows:

The judge, if the judge finds the facts, or the jury, if the jury finds the facts, must believe that it is highly probable that the facts are true or exist; while it is not necessary to believe to the point of almost certainty, or beyond a reasonable doubt that they are true or

³⁷ See (1937) 11 U. OF CIN. L. REV. 119, Trial by Jury, a report of a conference. Judge W. B. Wanamaker speaking upon the subject of "Instructing the Jury" said that he had prepared and mailed a questionnaire to 2250 former jurors in Summit County, Ohio. He received 843 replies. One question was "What propositions of law were most difficult to understand?" Highest on the list was "Preponderance of the evidence." Two hundred and thirty-two (232) jurors found this instruction the most difficult to understand. "Proximate cause" was next. Here the count was 203. "Reasonable doubt" was third highest with a count of 136.

This poll strongly indicates that customary instructions upon burden of proof are far from satisfactory.

exist, or that they certainly are true or exist; yet it is not sufficient to believe that it is merely more probable that they are true or exist than it is that they are false or do not exist.

When instructing a jury upon the subject of proving an issue of fact by clear and convincing evidence or by evidence of similar quality, the court may read to the jury the following instruction, as to this burden, and no other or further instruction as to it need be given to them.

INSTRUCTION: The court instructs you that by the law of this state burdens of proving facts are imposed upon parties to lawsuits, and other types of legal proceedings, for the purpose of reaching wise and just decisions.

The court instructs the jury, wherever you have been instructed in other instructions in this case, that a party to this action has the burden of proving a fact or facts by clear and convincing evidence [or similar expression if a similar expression is used in other instructions] the burden of proof imposed is the following:

The burden is not a burden of merely producing a greater number of witnesses or a greater quantity of evidence. The burden therefore is not necessarily carried by the introduction of the greater number of witnesses or the greater quantity of evidence. A greater number of witnesses or a greater quantity of evidence are factors which you may take into account in determining whether the burden of proof has been carried. Neither the greater nor the lesser number of witnesses or quantity of the evidence is the sole test to be applied in determining whether the burden of proof, imposed by law, has been carried because the burden so imposed is one of convincing your minds. Belief in the truth of assertions, therefore, is not to be reached by merely calculating the numbers of witnesses or by estimating the quantities of evidence.

The burden is not a burden of convincing you that the facts which are asserted are certainly true or that they are almost certainly true, or are true beyond a reasonable doubt. It is, however, greater than a burden of convincing you that the facts are more probably true than false.

The burden imposed is to convince you that the facts asserted are highly probably true, that the probability that they are true or exist is substantially greater than the probability that they are false or do not exist.

If then you believe upon consideration and comparison of all the

evidence in the case that there is a high degree of probability that the facts are true you must find that the fact have been proved.

The court instructs you that even though you believe that it is more probable that the facts are true or exist than it is that they are false or do not exist, but you do not believe that it is highly probable that they are true or exist, the facts have not been proved.

If you believe that it is as probable, or more probable, that the facts are false or do not exist than it is that they are true or exist, or highly probable that they are false or do not exist, then you will find that the facts have not been proved.

PROOF BEYOND A REASONABLE DOUBT.³⁸ PRESUMPTION OF INNOCENCE.³⁹ All persons accused of crime are presumed to be innocent.

In prosecutions for crime, or in any civil action or proceeding, when the rule of law now is or hereafter shall be that the prosecution,

³⁸ In a number of states statutes have been enacted dealing with the question of burden of proof beyond a reasonable doubt in criminal cases. See 9 WIGMORE, *op. cit. supra* note 1, at 317. In CAL. PEN. CODE §§ 1096-1096a there appear the inept expressions "moral evidence," "abiding conviction" and "moral certainty." The statute evidently is based upon Chief Justice Shaw's charge in *Commonwealth v. Webster*, *supra* note 28.

CAL. PEN. CODE §1096a provides that the court may read to the jury, *ibid.* §1096, and that no further charge need be given on the question of presumption of innocence and burden of proof. It is questionable whether reading to the jury a statute defining reasonable doubt, etc., is the best solution of the problem. In Indiana a statute exists, §2302, IND. ANN. STAT. (Burns 1926), which reads as follows:

"2302. Reasonable doubt.—261. A defendant is presumed to be innocent until the contrary is proved. When there is a reasonable doubt whether his guilt is satisfactorily shown, he must be acquitted. When there is a reasonable doubt in which of two or more degrees of an offense he is guilty, he must be convicted of the lowest degree only."

In Idaho, IDAHO CODE ANN. (1932), §19-2004; Kansas, §62-1439, KAN. GEN. STAT. ANN. (Corrick 1935); Nevada, §9961, NEV. COMP. LAWS (Hillyer 1929); North Dakota, §10831, N. D. COMP. LAWS ANN. (1913); South Dakota, §34-3635, S. D. COMP. LAWS (1929); Utah, §105-32-4, UTAH REV. STAT. (1933), similar statutes exist.

In Georgia it is provided by statute as stated in note 36, that "moral and reasonable certainty" is all that is required in legal investigations, that in civil cases the preponderance of the evidence is sufficient to produce mental conviction, but that in criminal cases "a greater strength of mental conviction is held necessary to justify a verdict of guilty," §38-105 GA. CODE (1933). By §38-110 of the same code, the degree of belief to convict in criminal cases is defined as follows:

"38-110. When evidence warrants conviction; reasonable doubt.—Whether dependent upon positive or circumstantial evidence, the true question in criminal cases is, not whether it be possible that the conclusion at which the evidence points may be false, but whether there is sufficient evidence to satisfy the mind and conscience beyond a reasonable doubt."

The FEDERAL RULES OF CRIMINAL PROCEDURE, PRELIMINARY DRAFT, seems to contain no rule on the subject.

³⁹ Strictly speaking the idea of a presumption of innocence in criminal cases adds

or a party to a civil action or proceeding, has or shall have the burden of proving guilt, of crime or other facts, beyond a reasonable doubt, the burden of persuasion is as follows:

The judge, if the judge finds the facts, or the jury, if the jury finds the facts, must believe to a point of almost certainty, or beyond a reasonable doubt, the truth or existence of all the facts essential to constitute the crime charged or the facts asserted in civil actions or proceedings.

A reasonable doubt exists where after a comparison and consideration of all the evidence the mind of the judge or the minds of the jurors are not convinced that it is almost certain that the accused committed the crime with which he is charged or are not convinced that it is almost certain that the facts asserted in civil actions or proceedings are true.

A reasonable doubt is not a mere possible doubt because everything relating to human affairs which must be proved by evidence is open or subject to possible doubt. The burden upon the prosecution, or parties to civil actions or proceedings, therefore, is not a burden of convincing the mind of the judge or minds of the jury beyond possibility of a doubt; nor is the burden upon the prosecution, or a party to a civil action or proceeding, to prove guilt to a certainty, or to prove that the facts asserted are certainly true.

When instructing a jury in a criminal prosecution upon the subject of proving guilt to a point of almost certainty, or beyond a reasonable doubt, the court may read to the jury the following instruction as to this burden and no other or further instruction as to it need be given to them.

INSTRUCTION: The court instructs the jury that the defendant is presumed to be innocent of the crime which he is charged to have committed. You are instructed that the fact that an indictment has been returned against the defendant [or an information has been filed

nothing to the burden of proof, or the duty of persuasion, placed upon the prosecution to prove guilt beyond a reasonable doubt. 9 WIGMORE, *op. cit. supra* note 1, §2511.

It also has been demonstrated, beyond question, that the presumption of innocence is not evidence of innocence. See THAYER, *op. cit. supra* note 4, Appendix B 551; *Holt v. United States* (1910) 218 U.S. 245, 20 Ann. Cas. 1138. See *Presumptions—Are They Evidence?* by the writer (1938) 26 CALIF. L. REV. 519.

It seems proper however to state to the jury that innocence is presumed to emphasize the fact that the burden is upon the prosecution and that the indictment or information is not the slightest evidence of guilt. It is therefore appropriate to combine the two ideas in a statute. *Commonwealth v. Madeiros* (1926) 255 Mass. 304, 151 N. E. 297, 47 A. L. R. 968, and note.

against him] is not the slightest evidence of his guilt and must not create in your minds any prejudice or furnish the basis for any unfavorable inference against him.

You are instructed that by the law of this state a burden of proving facts is imposed for the purpose of reaching wise and just decisions.

The court instructs you that by the law of this state the burden is not upon the defendant to prove his innocence; but, on the contrary that the burden is upon the prosecution to convince you, upon all the evidence before you, to a point of almost certainty, or beyond a reasonable doubt, that the defendant committed the crime he is charged to have committed.

A reasonable doubt is a doubt which exists, when after considering and comparing all the evidence, you cannot honestly say that it is almost certain that the defendant did the acts which he is charged to have done.

You are further instructed that the burden upon the prosecution is not a burden of convincing you of the guilt of the accused to the point of absolute certainty nor beyond the mere possibility of doubt, since everything relating to human affairs, which must be proved by evidence, is open or subject to possible doubt.

You are also instructed that the burden upon the prosecution of establishing the guilt of the defendant as almost certainly true, or true beyond a reasonable doubt, is not a burden of merely producing a greater number of witnesses or a greater quantity of evidence. The burden therefore is not necessarily carried by the introduction of the greater number of witnesses or the greater quantity of evidence. A greater number of witnesses or a greater quantity of evidence are factors which you may take into account in determining whether the burden of proof has been carried. Neither the greater nor the lesser number of witnesses or quantity of the evidence is the sole test to be applied in determining whether the burden of proof, imposed by law, has been carried because the burden so imposed is one of convincing your minds. Belief in the truth of assertions, therefore, is not to be reached by merely calculating the numbers of witnesses or by estimating the quantities of evidence.

You are instructed that the prosecution has carried the burden of proof imposed upon it by law of proving guilt if, upon consideration and comparison of all the evidence in the case, you believe to a point of almost certainty, or beyond a reasonable doubt, that the defendant

did the acts constituting the crime with which he is charged, and you can honestly say that it is almost certain, or true beyond a reasonable doubt, that the defendant did the acts which he is charged to have done.

You are further instructed, since the burden is upon the prosecution to convince you, upon all the evidence before you, to a point of almost certainty, or beyond a reasonable doubt, of the defendant's guilt, that you must return a verdict of not guilty if you have a reasonable doubt as to whether he committed the crime with which he is charged in the indictment [or information].

In instructing a jury in a civil action or proceeding, other than a criminal prosecution, upon the subject of proving an issue of fact to a point of almost certainty, or beyond a reasonable doubt, the court may read to the jury the following instruction as to this burden, and no other or further instruction as to it need be given to them.

INSTRUCTION: The court instructs you that by the law of this state burdens of proving issues of fact are imposed upon parties to lawsuits, and other types of legal proceedings, for the purpose of reaching wise and just decisions.

The court instructs the jury, wherever you have been instructed in other instructions in this case, that a party to this action has the burden of proving a fact or facts to a point of almost certainty, or beyond a reasonable doubt, that the burden of proof imposed upon him is the following:

The burden is not a burden of merely producing a greater number of witnesses or a greater quantity of evidence. The burden therefore is not necessarily carried by the introduction of the greater number of witnesses or the greater quantity of evidence. A greater number of witnesses or a greater quantity of evidence are factors which you may take into account in determining whether the burden of proof has been carried. Neither the greater nor the lesser number of witnesses or quantity of the evidence is the sole test to be applied in determining whether the burden of proof, imposed by law, has been carried because the burden so imposed is one of convincing your minds. Belief in the truth of assertions, therefore, is not to be reached by merely calculating the numbers of witnesses or by estimating the quantities of evidence.

You are instructed that by the law of this state the burden is one of convincing you, upon all the evidence before you, to the point of almost certainty or beyond a reasonable doubt, of the truth or exist-

ence of the facts asserted. A reasonable doubt is a doubt which exists, when after considering and comparing all the evidence you cannot honestly say that it is almost certain that the facts asserted are true or exist.

You are further instructed that this burden is not a burden of convincing you to the point of absolute certainty or beyond the mere possibility of doubt since everything relating to human affairs which must be proved by evidence is open or subject to possible doubt.

You are instructed that the party has carried the burden of proof, imposed upon him by law, of proving the fact or facts, if, upon consideration and comparison of all the evidence in the case you believe to a point of almost certainty, or beyond a reasonable doubt, that the facts asserted are true or exist, and you can honestly say that the facts which he asserts are almost certain, or true beyond a reasonable doubt.

You are further instructed that if you have a reasonable doubt as to the truth or existence of the fact or facts asserted by the party who has the burden of proving them as almost certainly true, you must find that the fact or facts asserted have not been proved.⁴⁰

⁴⁰ It is believed the most that should be done, respecting instructions which are made parts of legislation, is to provide that the judge may give them; that if he does give them that they are declared to be sufficient expressions of the legislative will as expressed in statutes which define the burdens of proof. This method leaves open to trial judges an election to give other instructions on the subject which they may prefer. Other instructions will be correct, provided the statutory rules defining the required measures of persuasion are correctly incorporated in them.