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EVIDENCE-BURDEN OF PROOF

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EVIDENCE—BURDEN OF PROOF—In 1945, plaintiff, a common carrier, accepted a shipment of automotive parts from an army depot, which shipment had been loaded and sealed by service personnel before delivery to plaintiff. The bill of lading clerk, as was his usual practice, issued a straight bill without personally checking the contents.[1] In fact the contents were short of those indicated in the bill, as was discovered by plaintiff's employees when they checked the car immediately prior to forwarding. Plaintiff sued for the balance of the freight charge withheld by the United States to cover the shortage, the

[1] A practice any good auditor would condemn.

present opinion of the trial court being delivered in 1952. *Held:* because of the lapse of time and interim disbandment of army units, making proof by the government difficult,[2] plaintiff was required to produce "clear and concise" proof of its allegations, or more than a "preponderance of the evidence," which burden plaintiff did meet. *Detroit & T.S.L.R. Co. v. United States,* (D.C. Ohio 1952) 105 F. Supp. 182.

No fact in a law suit can be "proved" to the point of "certainty."[3] The only alternatives are degrees of uncertainty. In the bulk of civil actions the trier must find "what probably has happened"[4]—the prover having the burden of producing a "preponderance of the evidence."[5] Generally the measure of persuasion for criminal cases—i.e., "what has almost certainly happened"[6]—is rejected for civil suits.[7] However, a middle ground—"what highly probably has happened"[8] is often taken, the prover's burden then being characterized as a requirement of "clear and concise proof,"[9] or some similar phrase. Actions in which this burden is imposed are generally divisible into three groups:[10] (1) those in which there is some moral, or quasi-criminal, stigma attaching to the alleged wrongdoing;[11] (2) those in which there is some question of upsetting or establishing an act where a high degree of certainty is desirable;[12] (3) those in which

[2] 105 F. Supp. 182 at 184.

[3] See McBaine, "Burden of Proof: Degrees of Belief," 32 CALIF. L. REV. 242 (1944), for an excellent discussion of the several problems involved in varying the measure of a jury's persuasion.

[4] Id. at 246-247.

[5] 32 C.J.S., Evidence, p. 1046 et seq.

[6] McBaine, "Burden of Proof: Degrees of Belief," 32 CALIF. L. REV. 242 (1944).

[7] 9 WIGMORE, EVIDENCE, 3d ed., 327 et seq. (1940).

[8] McBaine, "Burden of Proof: Degrees of Belief," 32 CALIF. L. REV. 242 (1944).

[9] 9 WIGMORE, EVIDENCE, 3d ed., 329 (1940). For other phraseology of the same burden see 32 C.J.S., Evidence, p. 1059.

[10] The classification is the author's. 32 C.J.S., Evidence, p. 1059 says: "In a number of cases where an adverse presumption is to be overcome, or on grounds of public policy and in view of peculiar facilities for perpetrating injustice by fraud and perjury, [the heavier burden is imposed]." The difficulty with this is that presumptions may be involved in all of the present classes. It should be noted that the controversy over rebuttal of presumptions is only one facet of this larger problem. See Morgan, "Presumptions," 12 WASH. L. REV. 255 (1937).

[11] 9 WIGMORE, EVIDENCE, 3d ed., §2498, p. 329 et seq. (1940). Fraud, p. 329, n. 13; undue influence, p. 329, n. 14; usury, Ruckdeschall v. Seibel, 126 Va. 359, 101 S.E. 425 (1919); forgery or alteration of a deed, Lewis v. Blumenthal, 395 Ill. 588, 71 N.E. (2d) 36 (1947); conspiracy, Fife v. Great Atlantic & Pacific Tea Co., 356 Pa. 265, 52 A. (2d) 24 (1947); malicious prosecution, Montgomery Ward & Co., Inc. v. Kirkland, (Tex. Civ. App. 1950) 225 S.W. (2d) 906; suicide, Harless v. Atlantic Life Ins. Co., 186 Va. 826, 44 S.E. (2d) 430 (1947).

[12] 9 WIGMORE, EVIDENCE, 3d ed., §2498, p. 329 et seq. (1940). Upsetting an instrument for mutual mistake, p. 331, n. 17; establishing a last deed or will, p. 330, n. 15; impeaching a notary's certificate of acknowledgment, p. 332, n. 20; establishing prior anticipatory use of an invention, p. 333, n. 21; establishing agreement to hold deed absolute as a mortgage, p. 333, n. 22. Cf. In re Garrett's Estate, (Pa. 1953) 94 A. (2d) 357, wherein the court imposed the heavier burden on disappointed claimants to an estate appealing from a Master's findings of fact and law which had been adopted in toto by the trial court. Decedent died in 1930 and the Master had finally reported in 1950 after sifting some 26,000 claims by alleged next of kin. "In view of all the foregoing facts, the burden

the facility and temptation to fraud or perjury on the part of the claimant is strong,[13] the court being "suspicious."[14] Understandably, the three factors underlying this classification are often combined in some way in a single case. In the present action there was the question of upsetting the terms of a bill of lading which had been given statutory sanction.[15] The court, however, seized on the factor of the difficulty of the government's proof to impose the abnormal burden on the plaintiff. Admitting that this element of difficulty of a contester's proof is often found in our "temptation to fraud" classification above, it seems clear that the present case cannot be so classified, there being no question of facility or temptation to fraud.[16] Normally it would shock the senses of any lawyer to hear that his case is more difficult simply because the circumstances of his opponent's proof are difficult.[17] Yet the matter of convenience finds various expression in our laws. Many presumptions are grounded in the thought that the party presumed against has the more convenient access to the facts. One step further takes us into those cases we have classified as "temptation to fraud," and a heavier burden of persuasion. Can convenience alone justify the heavier burden? This reviewer has found no such situations, and in all fairness it is not felt that the present case should be so characterized. Perhaps a further element here is the idea that the government should not be harassed by claims supported by doubtful proof.[18] The language of the court's proposition, however, remains unique.

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of proving any claim *at this late date* must in fairness and justice be a heavy one for, unlike Tennyson's brook, the Garrett estate cannot go on forever." (p. 359) Italics ours. The case and the language indicate the difficulty of categorizing the grounds for imposing the heavier burden of persuasion.

[13] Establishing a parol, constructive or resulting trust, 9 WIGMORE, EVIDENCE 332, n. 18; establishing forfeiture of a mining claim, Thomson v. Allen, 2 Alaska 636 (1902); establishing claim against decedent's estate founded on lost note, Badover v. Guaranty T. & S. Bank, 186 Cal. 775, 200 P. 638 (1921); services to a deceased person, Breitinger v. Heisler, 155 Md. 157, 141 A. 538 (1928). None of the lists in notes 11, 12 or 13 should be considered complete.

[14] Taylor v. Laugenbacker, 130 N.J. Eq. 59 at 64, 21 A. (2d) 219 (1941), "This court regards with utmost suspicion oral agreements to make a will."

[15] Would it not be possible to classify this case as one of reforming an instrument for mutual mistake? It is clear that a bill of lading is given special force by statute, Section 102 of 49 U.S.C.A., set forth in principal decision at 183.

[16] While there was no such question in the present case it might well be contended that, in general, the disbandment of army units and dispersal of wartime records created a situation in which many ways of easy fraud could be developed. The question remains whether this is justification for the blanket imposition of a heavier burden of persuasion.

[17] The problem of lapse of time is clearly intended to be handled by the statutes of limitation.

[18] The heavier burden of persuasion is imposed where one seeks to prove: (1) that the order of a commission is unlawful or unreasonable, Mich. Stat. Ann. (1938) §22.585 as amended, 1951 Supp. 62; (2) that an income tax was illegally assessed, Smith v. Glen, (D.C. Ky. 1946) 67 F. Supp. 262; (3) that a tax valuation is unjust and inequitable, Nev. Comp. Laws (1929) §6551 as amended Stat. 1939, March 25, c. 179, p. 279, §6.