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Why a Burden of Going Forward

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WHY A "BURDEN OF GOING FORWARD"?

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It has become conventional for one about to enter the already bloody arena to grapple with the Burden of Proof to murmur, not a prayer, but an apology. To such a convention this writer is quite willing to conform, not only because conformity is (as in the case of many another convention) so simple and harmless, but because the seeming naïveté of his approach undoubtedly demands it.

The Burden of Proof has, within the memory of the older generation in the profession, developed a reputation as a most formidable and perplexing adversary. But is it now too late to inquire how much of that reputation is genuinely deserved and how much is attributable to perhaps unwitting, but certainly effective, publicity? To put it differently, is it not possible that the profession has, quite innocently, created a Frankenstein to haunt its dreams and strangle its thinking?

Paradoxically enough, the monster's first real claim to fame (or notoriety) arose with the revelation of its Jekyll-Hyde character[1]—that dual personality which made "the whole matter a very simple one."[2] That revelation has been hailed (or dubbed) by one eminent writer as "a triumph of legal analysis."[3] But to what end analysis? It may be that, to some, analysis is an end in itself. To others it is—and to those in the legal profession it should be—a means to simplification and clarification, not to complexity and confusion. If analysis leads us to the wrong destination, should we not retrace our steps and try another route? Or should we flounder around in the bog of confusion and churn it into a still more unhealthful stopping place? Let us first examine the analysis, as applied to a simple case.[4]

P brings an action in a court of competent jurisdiction against *D*. The substantive law designates facts *A* and *B* as those material to the case, *i.e.*, those upon the existence or non-existence of which *P*'s right to relief depends. If facts *A* and *B* are both found to exist, *P* is entitled to the relief claimed; if either is found not to exist, *P*'s claim for relief must be denied.

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[1] Commonly credited to Professor James Bradley Thayer. See THAYER, PRELIMINARY TREATISE ON EVIDENCE (1898) c. IX.

[2] Bohlen, *The Effect of Rebuttable Presumptions of Law upon the Burden of Proof* (1920) 68 U. OF PA. L. REV. 307. Professor Bohlen's discussion deliberately belies the simplicity of the matter.

[3] McCormick, *Charges on Presumptions and Burden of Proof* (1927) 5 N. C. L. REV. 291, 307.

[4] For the classic expositions of the analysis, see 2 CHAMBERLAYNE, MODERN LAW OF EVIDENCE (1911) cc. XI-XII; THAYER, *loc. cit. supra* note 1; 5 WIGMORE, EVIDENCE (2d ed. 1923) c. LXXXVII.

The court is in a state of inertia, we are told. *P* seeks action on the part of the court; he has asked the court to grant him certain relief. Hence *P* must assume the responsibility of moving the court to action. And the court will be so moved only when *P* has convinced[5] it that facts *A* and *B* exist. Accordingly, the law—whether it be the substantive law, the law of procedure, or the law of evidence seems to be utterly inconsequential for the purposes of this discussion, and yet the champions of each of these branches have battled back and forth across many a printed page—admonishes *P*, "If you want the relief you ask, you must convince the tribunal that facts *A* and *B* exist. You may not sit back and take advantage of *D*'s failure to prove that they do not exist." Thus the Burden of Proof is imposed upon *P*.[6]

But, say the analysts, there is another Burden which must be reckoned with, the Burden of Going Forward with Evidence. To illustrate the incidence of this Burden, Dean Wigmore likens the evidence stage of the trial to a football field, divided into three zones. The zone at each end is the peculiar domain of the judge; the middle zone is the exclusive domain of the jury. And, we may assume, a line across the center of the field marks the dividing line between conviction that facts *A* and *B* do exist and conviction that they do not. The party with the Burden of Proof (*P* in our assumed case) is given the ball at his end of the field. By the time the game is over, he must, to sustain or satisfy his Burden of Proof, have pushed the ball past the center of the field, thereby reaching a point where the tribunal will be convinced that facts *A* and *B* exist.

At the outset, he must, of course, attempt to advance the ball, for, if he fails to, he loses automatically. If his evidence is sufficient to advance the ball, but not sufficient to push it out of the end zone and into the center zone, he loses by a directed verdict or a peremptory nonsuit. The ball has come to rest in the domain of the judge, and, since it rests on the wrong side of the line of conviction, the judge must rule against him. This necessity for pushing the ball out of the domain of the judge,

[5] "By a preponderance of the evidence," "by clear and convincing evidence," "beyond a reasonable doubt" (in criminal cases), *etc.* For a discussion of these phrases supposedly denoting various *degrees* of conviction, see 5 WIGMORE, EVIDENCE (§§2497-8; Morgan, *Instructing the Jury upon Presumptions and Burden of Proof* (1933) 47 HARV. L. REV. 59, 63; Ray and McCormick, *Burden of Proof and Presumptions* (1934) 13 TEX. L. REV. 33, 46.

[6] This explanation of why any Burden of Proof is imposed, while ample for our simple hypothetical case, is deceiving when more complex situations are reached. It does not adequately explain the necessity for a Burden of Proof on each issue, especially when the Burden on part of the issues is imposed upon *D*. It is submitted that the explanation offered in the text *infra* is more reasonable in view of the admitted considerations which, we are told, lead to the imposition of the Burden of Proof upon *P* as to some issues and upon *D* as to others, *viz.*, general considerations of fairness and public policy. *Cf.* 5 WIGMORE, EVIDENCE §§2485-6.

thereby avoiding a peremptory ruling against him, is what is described as the Burden of Going Forward with Evidence.

P's evidence may be sufficient to push the ball into the middle zone of the field, in which case the jury is left to determine on which side of the line of conviction it rests. In this situation, we are told, *neither* party has a Burden of Going Forward, for the ball now rests in the jury's domain. Neither party is subject to a peremptory ruling by the judge. Hence the Burden of Going Forward has been neutralized.

Or *P*'s evidence may be sufficient to push the ball out of the domain of the judge at *P*'s end of the field, through the jury's zone, and on into the judge's domain at *D*'s end of the field. Now, if the ball comes to rest there, *D* is subject to a peremptory ruling of the judge against him. Hence the Burden of Going Forward with Evidence has been shifted to *D*.

Now it is *D*'s ball. If, when *P* rests his case, the ball is still in the end zone at *P*'s end of the field, *D* need do nothing but move for a directed verdict in his favor or for a compulsory nonsuit. If the ball has come to rest in the middle zone, *D* may or may not offer evidence, depending upon whether the ball rests on one side or the other of the line of conviction. If, however, *P* has succeeded in pushing the ball into the end zone at *D*'s end of the field, *D* must introduce evidence to avoid a directed verdict against him. He has the Burden of Going Forward.

Of course, once *D* begins to introduce evidence, the ball may be pushed back, perhaps not far enough to get it out of the judge's domain at his (*D*'s) end of the field; perhaps into the middle zone, in which case *D* has satisfied or neutralized the Burden of Going Forward again; or perhaps into the end zone at *P*'s end of the field, in which case *D* has now shifted the Burden of Going Forward back onto *P*. And so the game goes on until both parties rest.

But, we are reminded, the Burden of Proof, which was imposed upon *P* at the beginning of the trial, remains upon him throughout. *P* begins with two Burdens, the Burden of Proof and the Burden of Going Forward. He may be able to neutralize or satisfy the latter Burden, or perhaps even to shift it, but he cannot rid himself of the former.[7] Or, as is sometimes said, *P* starts out with two Burdens, one of satisfying the judge that he has enough evidence to go to the jury, the other of convincing the jury. And he must sustain both in order to obtain

[7] The writer does not propose, at this time, to enter into the controversy as to whether or not the Burden of Proof ever *does* or *can* shift. It seems to have been amply demonstrated elsewhere that Dean Wigmore's statement that this Burden "never shifts" is but an optimistic expression of the opinion that it *should never shift*. See 5 WIGMORE, EVIDENCE §2489. *Cf.* Bohlen, *loc. cit. supra* note 2; McCormick, *loc. cit. supra* note 3; Morgan, *Some Observations Concerning Presumptions* (1931) 44 HARV. L. REV. 906; Morgan, *loc. cit. supra* note 5.

the relief he seeks. But both Burdens do not operate simultaneously. The Burden of Proof operates only when the ball rests in the middle zone; the Burden of Going Forward operates when the ball rests in either of the end zones. In other words, the case is either one for the judge, or one for the jury. It is never a proper case for both.

It is difficult to find serious fault with this analysis *per se.* Nor can one deny the clarity with which its exponents have stated it. But may we not ask: What was the *necessity* for it? Does it serve any really *useful* purpose?

We would undoubtedly be met with the answer that it was born of confusion, of "the lamentable ambiguity of phrase and confusion of terminology under which our law has so long suffered."[8] But has not the child of confusion borne even greater confusion? Fire can sometimes be fought with fire, but confusion has never been extinguished with greater confusion. And that confusion exists would hardly be denied by the hardiest champion of the analysis. The analysis was, hopefully no doubt, prescribed as a remedy for confusion. It has not effected a cure; it has aggravated the condition. Perhaps the analysis itself is not at fault; perhaps it has been unskillfully administered. Be that as it may, it has been tried and failed. Could it be because the analysis has made what is essentially simple a rather complicated matter? Could it be because the analysis has, by its own example, put a premium upon complexity?

What is the Burden of Proof, and for what purposes is it important? It might be stated, parenthetically, that the term itself is not the happiest. The opinion is ventured that, if a jury were to be charged, simply, that *P* has the burden of *proving* facts *A* and *B* (to revert to our sample case), they would all have a pretty good idea what was meant. They might, if called upon to do so, have some difficulty making articulate the meaning conveyed to them, but the chances are that they would have as definite and accurate a basis for their determination as words can convey—certainly as accurate a basis as is provided by the elaborate charges sometimes, if not commonly, employed. "To prove" something is laymen's language, the King's English and the man-in-the-street's English. And for one party to an argument to have "the burden of proving" something is comprehensible to more than the initiated few. But to charge that "the Burden of Proof is upon *P, etc.*" is to introduce the mystical. "Burden of Proof" sounds like a term of art. It sounds technical—and heaven knows it has become so! But need it be?

It seems perfectly obvious that, under our system of judicial administration, one party or the other must win in a lawsuit. There can be

[8] See THAYER, *loc. cit. supra* note 1; 5 WIGMORE, EVIDENCE 437.

no such thing as a tie score. *P* has asked for certain relief. Either he gets it or he doesn't. Either he wins or he loses.[9] Accordingly, if his right to relief depends upon the existence of facts *A* and *B*, it must be determined which party shall win if the tribunal is not convinced either that those facts do exist or that they do not. Does the imposition of the Burden of Proof upon *P* mean any more than that *P* shall lose if the tribunal is left in doubt as to the existence of the material facts? Does it have any real importance except to settle the controversy in *D*'s favor in the contingency that the jury is left unconvinced by the evidence?[10] And is not that a remote and unusual contingency?

Now what does the Burden of Going Forward mean? By definition, it means only that the party who bears it is subject to a peremptory ruling by the judge if he rests at that point. It is merely another way of describing a very common and well-understood situation.

What, then, is the practical importance of the Burden of Going Forward? With all deference, it is submitted that it has *none*.[11] If, by definition, the Burden of Going Forward upon one of the parties means simply that he is subject to a peremptory ruling by the judge, the Burden can be no concern of the jury's. If the case is a proper one for the jury, neither party is subject to a peremptory ruling. And there can be no advantage to be gained from relating to the jury the shiftings of the Burden during the course of the evidence. To do so would only confuse them, and, even if they were to understand the charge, it could be of no assistance to them in the performance of their function.

Does it aid the judge in his conduct of the trial to know where the Burden lies at any particular stage? Certainly if the judge is called upon to rule upon a motion for a nonsuit or a directed verdict, he must determine where the Burden rests. But how does he determine that? By determining whether he should grant or deny the motion. The Burden offers no *test* to assist him in making his ruling. It simply *describes* his ruling in other words. At only one other stage of the trial could the position of the Burden be of importance to the judge, *viz.*, before *any* evidence has been introduced. And, in that situation,

[9] Nominally, at least. Of course, *P* might bring an action in which he asks for $10,000 damages, and recover judgment for nominal damages only. In such a case, *P* still "wins" in the sense that a judgment is rendered in his favor, although *D* may be the one who feels victorious.

[10] Of course, where *P* has the Burden of Proof on one issue and *D* has the Burden on another, the two Burdens would be meaningless if they were of equal weight. For example, if *P* has the Burden of proving negligence and *D* the Burden of proving contributory negligence, and if the jury were left in doubt on both issues, we wouldn't know which party should win unless the Burden on one of the parties was considered a primary or heavier burden. In such a case, of course, *P*'s Burden is the primary or heavier Burden, and *D*'s Burden can be disregarded until *P* has sustained his Burden.

[11] A contrary opinion which, because of its source, commands respect and consideration appears in Morgan, *op. cit. supra* note 7, at 911-2.

the judge, in order to determine which party has the Burden of Going Forward must first determine which party has the Burden of Proof. There again, the Burden of Going Forward furnishes no *test* to assist the judge; it merely *describes* his ruling (if one is ever necessary at that point) that *P* or *D* has the Burden of Proof.

If, then, the Burden of Going Forward is of no practical importance to either the judge or the jury, is it helpful to the parties or their attorneys? This much can be conceded. The decision of a party as to whether he shall introduce any or more evidence depends upon his knowing the effect of the evidence introduced up to that point upon the minds of the judge and jury. He will want to know in which zone the ball is resting, and if in the middle zone, whether it lies on one side or the other of the line of conviction. But *how can* he know? The opinion[12] that the incidence of the Burden of Going Forward is of real and continuing importance to the attorneys in their conduct of a case rests, seemingly, upon the assumption that the parties *can* know its position at any given point. In other words, it seems to be assumed that there is a scoreboard in the courtroom which, after each new piece of evidence, flashes some such report as "Third down, and five to go to neutralize the Burden of Going Forward." Unfortunately, that is seldom, if ever, the case. To be sure, a ruling on a motion for a nonsuit or a directed verdict informs the parties as to where the ball lies—or at least where it *doesn't* lie. But such rulings are generally made at only two or three stages of the trial: when the plaintiff has rested, when the defendant has rested, and at the conclusion of all the evidence. A ruling made after all the evidence is in cannot help either party with his problem of whether to introduce evidence. That leaves only two points during the evidence stage of the trial at which the parties can know at all definitely in which zone the ball lies. And even at those two points, the ruling comes *too late* to be of assistance to the party faced with the necessity for an immediate decision. To illustrate: when the plaintiff rests, the defendant is the one who must decide whether or not to offer evidence. He may move for a compulsory nonsuit or a directed verdict in his favor. Of course, if the motion is *granted,* he knows that the plaintiff still has the Burden of Going Forward, and he (the defendant) need do nothing further. But suppose that the motion is *denied.* The ruling informs the defendant that the plaintiff no longer has the Burden of Going Forward. But it does not tell the defendant whether the Burden of Going Forward has been merely neutralized or whether it has shifted onto him. And the only way he can find out definitely is by first *making his decision, i.e.,* by resting, without introducing evidence, and letting the *plaintiff* move for a directed verdict in *his* favor. After the

[12] See note 11, *supra.*

defendant has rested—has made his decision—a ruling on the plaintiff's motion, informing him as to the whereabouts of the Burden of Going Forward, can hardly help him in making a decision already made. Furthermore, the defendant himself cannot invoke a ruling which will tell whether or not *he* has the Burden. Such information comes only on a ruling invoked by a motion of the *other party*. And the situation is the same, with the parties reversed, when the defendant rests after introducing his evidence. Thus the parties are forced to rely entirely upon their own estimates of the strength of the evidence already introduced, just as a prize fighter must rely upon his own estimate as to whether he or his opponent won the last round. A party cannot turn to the judge after the testimony of each witness and say, "*Now* where is the Burden of Going Forward, if your Honor please?"

Furthermore, if the Burden of Going Forward is to be justified by reason of its importance to the parties in determining whether to introduce more evidence, should there not be a *third* Burden invented to describe the situation where a party has presented enough evidence to go to the jury, but not enough to convince them of his contentions? In other words, if *P*, for example, has been successful in pushing the ball into the jury's zone, but not across the center line, shouldn't there be a Burden of Going Forward with Still More Evidence imposed upon him? The Burden of Proof describes the consequences when the ball comes to rest squarely at midfield. The Burden of Going Forward describes the situation where the ball comes to rest in either end zone. Why not a Burden describing the situation where the ball lies *between* the end zone and midfield, if Burdens are important to apprise the parties of their respective positions at each point during the introduction of evidence?

But let us assume for the moment that the parties *can* know where the Burden of Going Forward rests at any given point. What benefit do they derive from the knowledge? If *P*, for example, knows that he has the Burden of Going Forward, he knows that he is subject to a peremptory ruling against him unless he comes forward with enough evidence to be considered by the jury. But, to know that he had the Burden of Going Forward, he would first have to know that he was subject to a peremptory ruling. Again, then, the Burden simply *describes* in other words a situation of which he was perfectly aware (if he knew where the Burden rested) and which attorneys fully understood long before the term "Burden of Going Forward" was ever invented.

Now what to do about it? The Burden of Proof is a phrase which describes the consequences when the jury is left in doubt by the evidence. The Burden of Going Forward is another way of describing

the liability of one party or the other to a peremptory ruling by the judge. The Burden of Proof, if reduced to its simple and unadulterated meaning, is a useful, and even necessary, concept. It is submitted that the Burden of Going Forward, so called or under one of its many aliases, is not. It supplies no crying need; it has no practical value. And it does confuse, not only our vocabulary, but our thinking. (It may be that the confusion has arisen, in large measure, from the use of the word "Burden" to preface both terms, with the resulting uncertainty as to *which* "Burden" is intended when the word is used alone or without artful elucidation. A concession of that point does not impair the conclusion.) Is not the solution to amputate the Burden of Going Forward from the body of legal thought and language, and, when one party is subject to a peremptory ruling, to say so in so many words?[13] Will the clarity of our thinking or of our description have suffered? We venture a negative answer.

[13] It has been argued that the Burden of Going Forward is not strictly a "burden," *i.e.*, duty, at all, but is merely a "right" to discredit the opponent's *prima facie* case. See Fisk, *Burden of Proof* (1927) 1 U. OF CIN. L. REV. 257, 267 n. 7.

In the first place, that use of the term does not seem to be accurate, according to the Thayer-Wigmore-Chamberlayne analysis. In the second place, the distinction drawn between the Burden of Proof, as a true "burden," or duty, and the Burden of Going Forward, as a mislabeled "right," seems an empty one. The penalty for failure to sustain one "Burden" is the same as that for failure to sustain the other, *viz.*, loss of the suit. Accordingly, the distinction seems to be merely the difference between an affirmative-in-form and a negative-in-form statement of the same thing.