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THE UNIFORM RULES OF EVIDENCE AND THE NORTH DAKOTA LAW OF EVIDENCE (Continued)

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BURDEN OF PROOF[1]

I. Burden of Proof and Burden of Producing Evidence Distinguished

"Burden of proof" has often been used by the courts to describe two entirely distinct and well recognized burdens which fall upon the litigants in the fact-finding process. These are the obligation to persuade the trier of fact of the existence of facts and the obligation to produce evidence of the existence of those facts.[2] These two burdens are separately defined in the Uniform Rules to distinguish them clearly. Uniform Rule 1(4) provides:

> "'Burden of Proof' means the obligation of a party to meet the requirements of a rule of law that the fact be proved either by a preponderance of the evidence or by clear and convincing evidence or beyond a reasonable doubt, as the case may be. Burden of proof is synonomous with 'burden of persuasion.'"

Rule 1(5) provides:

> "'Burden of producing evidence' means the obligation of a party to introduce evidence when necessary to avoid the risk of a directed verdict or peremptory finding against him on a material issue of fact."

Generally speaking, there are two basic differences between Uniform Rule 1(4) defining "burden of proof" and the analogous Model Code rule 1(3) defining what is there termed the "burden of persuasion."[3] The first relates to the general form of the two rules. Uniform Rule 1(4) defines "burden of proof" in terms of the nature of the obligation of a party rather than in terms of result as in Model Code rule 1(3), that is, defining it as the obligation of a party to persuade the trier of the existence of a fact as distinguished from defining it as the burden which is discharged

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1. Other comparisons of the burden of proof provisions of the Uniform Rules of Evidence and state law include Gausewitz, *Presumptions*, 40 Minn. L. Rev. 391, 399-400 (1956); Morgan, *Presumptions*, 10 Rutgers L. Rev. 512 (1956); and McBaine, *Burden of Proof: Presumptions*, 2 U.C.L.A. L. Rev. 13 (1954).

2. 9 Wigmore, Evidence §§ 2485, 2487 (3d ed. 1940); McCormick, Evidence § 306 (1954), hereinafter cited as Wigmore and McCormick respectively.

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." Model Code of Evidence rule 1(3) (1942), hereinafter cited as Model Code.

when the trier is persuaded that the fact exists.[4] A similar difference exists in connection with the respective definitions of the "burden of producing evidence" in Uniform Rule 1(5) and Model Code rule 1(2).[5] The rationale of the Model Code formulations is set forth in the comments to the rules as follows:

> "Neither the Rules nor the decisions require that the evidence discharging either burden shall have been introduced by the party having the burden. The burden is not that of producing evidence or of persuading, but merely the burden of carrying the risk of non-production or of non-persuasion. The burden bearer must see to it that the evidence is before the trier or that the trier is persuaded; but the evidence discharging the first burden may have been offered by the other party, and the persuasive evidence or argument or both in discharge of the second burden may also have come from him."[6]

Though this is true, it is not necessarily regarded as reason for preferring the Model Code form over that of the Uniform Rules. As to the burden of producing evidence, Uniform Rule 1(5) qualifies the obligation by specifying "when necessary". As to the burden of proof, this also seems largely taken care of by the wording of Uniform Rule 1(4) in that it does not specify that the party having the burden shall prove, but only that a party meet the requirements of a rule of law that the fact be proved. Since the language of Uniform Rules 1(4) and 1(5) is "consistent with traditional concepts" and there appear to be no substantial arguments for preferring one form over the other, the form of the definitions may be regarded as preferable to that of the Model Code rules.

The second principal difference between Uniform Rule 1(4) and Model Code rule 1(3) is that the Uniform Rule employs the three commonly accepted criteria for satisfying the burden of proof: preponderance of evidence; clear and convincing evidence; and proof beyond a reasonable doubt. As will be discussed later, the inclusion of these tests within Uniform Rule 1(4), within certain limitations, can prove advantageous.[7]

As to North Dakota, it requires no citation of authority for the proposition that the distinction between the burden of proof and

4. Handbook, Nat'l. Conf. of Com. on Uniform State Laws 165 (1953), hereinafter cited as Handbook. See also, McCormick, § 307, who defines "burden of persuasion in terms of the obligation of the party. *But compare* Wigmore, § 2485, who speaks of the "risk of non-persuasion".

5. " 'Burden of producing evidence of a fact' means the burden which is discharged when sufficient evidence is introduced to support a finding that the fact exists." Model Code, rule 1(2).

6. Model Code, 74.

7. See pages 209-213 *infra*.

the burden of producing evidence is well recognized, though it may be useful to note that the confusion arising out of the use of "burden of proof" to describe these two distinct burdens has not gone unnoticed by the Supreme Court and, in an early case, it very clearly distinguished them by approving of "burden of proof" to describe the obligation of persuasion and "burden of evidence" to describe the obligation of producing evidence.[8]

II. An Analysis of Burden of Proof[9]

As to the Obligation of the Parties. Uniform Rule 1(4) does not spell out *who* has the burden of proof as to any particular issue of fact. This is as it should be since there is no single criteria suitable for allocating the burden of proof for all cases.[10] It is true that in civil cases, as a general rule, the burden of proof is cast upon the party who must affirmatively plead as to a particular issue of fact.[11] Thus, in North Dakota, for example, the burden of proof is upon the plaintiff as to the material allegations in his complaint,[12] or, where the defendant must plead affirmatively, the burden of proof rests with him.[13] And, in criminal cases, as a general rule throughout the United States,[14] as well as in North Dakota,[15] the burden of proof falls upon the prosecution.

At most, however, the rules governing the burden of proof are mere rules of thumb which can be relied upon in allocating the burden of proof. They cannot be regarded as absolutes in determining for every case who may have the burden of proof.[16] This

8. Guild v. Moore, 32 N.D. 432, 155 N.W. 44 (1914). See also, MacDonald v. Fitzgerald, 42 N.D. 133, 171 N.W. 879 (1919).

9. For reasons later given, I prefer the term "persuasion" to that of "proof". See page 206 *infra*. However, the term "proof" is used in this paper as synonomous with "persuasion" to be consistent with the Uniform Rules of Evidence as they are proposed.

10. Wigmore, § 2486; McCormick, § 318.

11. Clark, Code Pleading § 96 (2d ed. 1947). See also, McCormick § 318.

12. Guild v. Moore, 32 N.D. 432, 155 N.W. 44 (1915). See also, Lindberg v. Burton. 41 N.D. 587, 171 N.W. 616 (1919).

13. Kuhn v. Marquart, 45 N.D. 482, 178 N.W. 428 (1920).

14. Wigmore, § 2497; McCormick, § 318.

15. State v. Schmidt, 72 N.D. 719, 10 N.W.2d 868 (1943). See also, State v. Tennyson, 73 N.D. 254, 14 N.W.2d 171 (1944), holding that the time within which an offense is committed is a jurisdictional fact and that the state has the burden of proving affirmatively the commission of the offense within the period prescribed by the applicable statute of limitations.

16. As to civil cases, for example, in some cases it has been held that the burden is on the person who has a negative averment to prove (Wigmore, § 2486) and, in others, on the person who has peculiar knowledge of the facts alleged. (Wigmore, § 2486) As to these exceptions, see Professor McCormick's discussion. As to the first, he concludes that "this was probably to be understood as properly applying only to the denial by a party of an opponent's previous pleading, and now one who has the burden of pleading a negative fact as part of his cause of action generally has the accompanying burdens of producing evidence and persuasion." (McCormick, § 318.) And, as to the second exception mentioned above, he says that its effect is limited "to apportioning the burden of producing evidence without affecting the burden of persuasion." (McCormick, § 318) And, for a good example of this, see Duncan v. Great Northern Railway Co., 17 N.D.

is "a question of policy and fairness based on experience in different situations * * * and, for individual instances, there is nothing to do but ascertain the rule, if any, that has been judicially determined for that particular class of cases."[17] For this reason, any attempt to formalize a rule for allocating the burden of proof in all cases would be fruitless and unduly complicate the Uniform Rules.[18]

As to the Nature of the Proof. "Burden of proof", as it is used in Uniform Rule 1(4), means burden of persuasion. This, of course, refers to the effect of evidence on the mind of the trier of fact as to his belief or disbelief of an allegation of fact. In this respect, it is similar to Model Code rule 1(3)[19] and is in accord with modern notions of the meaning of "burden of proof".[20] It is strange, however, that the framers did not follow the Model Code in adopting the term "burden of persuasion" for Uniform Rule 1(4) because of the tendency in the judicial opinions to use "burden of proof" to describe both the burdens of "persuasion" and of "evidence."[21] There is at least one case in North Dakota which is troublesome for this reason,[22] though, as we have observed, the Supreme Court has endeavored to make the distinction clear.[23] However, to adopt the term "burden of persuasion" *in lieu* of "burden of proof" and the parenthetical statement in Uniform Rule 1(4) that "burden of proof" is synonomous with "burden of persuasion" would further clarify the distinction and lead to a more accurate usage.

A somewhat more serious problem in regard to the meaning of "proof" or "persuasion" arises within the Uniform Rules themselves. If "burden of proof" in Uniform Rule 1(4) is— as it is said to be — the obligation of a party to persuade, proof necessarily constitutes what McCormick has referred to as the "end-result of conviction or persuasion produced by evidence."[24] It then follows

610, 118 N.W. 826 (1908), wherein the court, though speaking in terms of a shifting of the burden of proof to the defendant because of facts peculiarly within his knowledge, actually seems, in reality, only to have been alluding to a shifting of the burden of producing evidence.

As to criminal prosecutions, see State v. Taylor, 70 N.D. 201, 293 N.W. 219 (1940), wherein the Supreme Court apparently holds that a plea of former jeopardy is an affirmative defense upon which the defendant has the burden of proof.

17. Wigmore, § 2488. See also, McCormick, § 318 and McBaine, *Burden of Proof: Presumptions*, 2 U.C.L.A. L. Rev. 13-14 (1954).

18. McBaine, *supra* note 17.

19. See note 3 *supra*.

20. Wigmore, § 2485; McCormick, § 318; Morgan, Some Problems of Proof Under the Anglo-American System of Litigation 70 *et seq.* (1956); and McBaine, *supra* note 17.

21. Model Code, 73.

22. Duncan v. Great Northern Railway Co., 17 N.D. 610, 118 N.W. 826 (1908), but, with regard to this case, see note 16 *supra*.

23. See page 205 *supra* at note 8.

24. McCormick, § 306.

that Uniform Rule 1(3) defining "proof" must be re-examined for purposes of determining whether it conforms to the intentions of the framers of the Uniform Rules. In Rule 1(3) "proof" is defined as:

> "all of the evidence before the trier of the fact relevant to a fact in issue which tends to prove the existence or non-existence of such a fact."

The phrase "all of the evidence", as pointed out by Professor Morgan, surely refers to the quantity or mass of evidence and cannot thus harmonize with the definition of "burden of proof" in Rule 1(4) as a "burden of persuasion".[25] "Proof" then, within the meaning of Rule 1(3), only constitutes one of the two elements requisite to persuasion or conviction, namely, the mass of evidence. The other element, that of persuasion, is lacking, unless, we can, by interpretation, read the element into the Rule. This is possible by concluding that since "burden of proof" in Uniform Rule 1(4) is declared to be synonomous with "burden of persuasion", the words "to prove" in Uniform Rule 1(3) mean "to persuade" and hence, "proof" is, as the framers interpret it in the comments to the rule, "the cumulative effect of evidence."[26] But, in adopting new rules of evidence, we ought not to require immediate judicial interpretation. The language of Uniform Rule 1(3), it seems, would not only require interpretation, but it confounds the distinction between the burden of proof and the burden of producing evidence — a distinction which the framers have sought to make clear by defining the two terms in the Uniform Rules. In other words, does "proof" mean only the mass of evidence, or only its persuasive character, or is it both, that is, "the cumulative effect of evidence". An alternative to Uniform Rule 1(3) is to define "proof" as follows:

> " 'Proof' is the cumulative effect of all of the evidence revelant to a fact in issue which persuades the trier of fact of the existence or non-existence of such fact."[27]

As to the Degree of Proof. Some courts still cling to the notion that a verdict can be based on nothing less than "actual belief" or a "conviction" of the truth of a fact.[28] But, as Professor McCormick has said, "it is apparent that an investigation by fallible men

25. Morgan, *Presumptions*, 10 Rutgers L. Rev. 512 (1956).
26. Handbook, 165.
27. It should also be noted that Judge Eugene A. Burdick has already questioned Uniform Rule 1(3) by proposing that it be amended to provide that " 'Proof' is the cumulative effect of all of the relevant evidence material to the issues in controversy." See the letter to Dean O. H. Thormodsgard, dated December 12, 1957.
28. McCormick, § 319. See also, the thorough analysis of Professor J. P. McBaine, in McBaine, *Burden of Proof: Degrees of Belief*, 32 Calif. L. Rev. 242, 249-258 (1944).

based upon the testimony of other men with all their defects of veracity, memory and communication, cannot yield certainty."[29] Though a finding of fact may have, for purposes of the legal controversy, all the consequences of certainty, it is too much to expect that the trier of fact ascertain, in every instance, the truth or certainty of what has transpired. Professors McBaine and Morgan have written convincingly that any such finding can be based rationally only on a weighing of probabilities,[30] and some courts, including the Supreme Court of North Dakota within certain limits, have, with candor, adopted this approach.[31]

Similarly, the framers of the Uniform Rules have recognized that the weighing of probabilities is the mental process involved in making a finding of fact,[32] even though "finding of fact" is defined in Rule 1(8) as meaning "the determination from proof or judicial notice of the existence of a fact."[33] In contrast, the Model Code rule 1(5) defines "finding of fact" as "determining that its existence is more probable than its non-existence."[34] The definition in Uniform Rule 1(8) was selected in preference to that in Model Code rule 1(5) for the reason that "the actual finding has a legal significance far beyond a finding of probability" and is preferable because it recognizes that a fact, when found, exists in legal contemplation.[35]

Even so, within the framework of weighing probabilities, there must still be a test, or tests, for determining whether the fact exists in legal contemplation, since, depending upon the nature of the issue or case involved, it is the policy of the law to require different degrees of proof.[36] If not, how can the judge in a jury

29. McCormick, § 319. See also, McBaine, *supra* note 28 at 246.

30. McBaine, *supra* note 28 at 242 *et seq.* Morgan, *Instructing the Jury Upon Presumptions and Burden of Proof*, 47 Harv. L. Rev. 59 (1933).

31. McCormick, § 319. The view of the Supreme Court of North Dakota is, in addition to other cases, set forth in Farmers' Mercantile Co. v. Northern Pac. Ry. Co., 27 N.D. 302, 146 N.W. 550 (1914). See the discussion at pages 213-216 *infra*.

32. Handbook, 165.

33. Uniform Rule 1(8) provides in full: "'Finding of fact' means the determination from proof or judicial notice of the existence of a fact. A ruling implies a supporting finding of fact; no separate or formal finding is required unless required by a statute of this state."

34. Model Code rule 1(5) provides in full: "'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."

35. Handbook, 165. But note Professor Edmund M. Morgan's criticism as follows: "If this is intended as a reason for the rejection, it connotes an amazing disregard of actualities. Of course, the mental process is a weighing of probabilities, but, equally of course, the result is a determination of the preponderance of the probabilities, and the obligation is to report the fact as found when the preponderance is of the prescribed degree. And, of course, the finding has for the purposes of the case all the consequences of certainty, but, as every lawyer knows, this certainty is only hypothetical and is treated as actual only for the purposes of adjusting legal relations between the litigants and their privies." Morgan, *Presumptions*, 10 Rutgers L. Rev. 512, 521 (1956).

36. Wigmore, §§ 2497 & 2498; McCormick, §§ 319-321.

case correctly inform the jury as to what is expected of it in resolving disputes of fact or how can the jury be expected to perform its function intelligently and with a purpose of doing justice between the parties? The tests commonly recognized throughout the United States, including North Dakota, are: "preponderance of the evidence" for the ordinary civil cases;[37] "clear and convincing evidence" where certain types of issues are involved, such as fraud,[38] suits to declare a deed, absolute in form, to be a mortgage,[39] suits to establish a parol or constructive trust,[40] and reformation on grounds of mutual mistake;[41] and "beyond a reasonable doubt" for criminal cases.[42]

As noted, Uniform Rule 1(4) contains these three commonly accepted tests as the measures of proof which are to be applied. It is doubtful, however, that the rule is adequate in this respect unless the terms are somehow defined to render them consistent among themselves and with the concept of persuasion.[43] Otherwise, the confusion and uncertainty regarding the meaning of these tests as reflected in past decisions, would, through the Uniform Rules, be perpetuated. Judge and jury would be no better off than they are at the present in understanding and applying the tests.

Persuasion, it has been noted, refers to the effect of the evidence on the mind of the trier of fact. And, consistent with this theory, it is submitted that the tests employed in Uniform Rule 1(4) are intended to require a progressively greater degree of belief in the mind of the trier of fact. Yet, "preponderance of the evidence" and

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37. Fuchs v. Lehman, 47 N.D. 58, 181 N.W. 85 (1920). See also, Reichert v. Northern Pac. Ry. Co., 39 N.D. 114, 167 N.W. 127 (1918); Farmers' Mercantile Co. v. Northern Pac. Ry. Co., 27 N.D. 302, 146 N.W. 550 (1914); Rober v. Northern Pac. Ry. Co., 25 N.D. 617, 142 N.W. 42 (1913); and Meehan v. Great Northern Ry. Co., 13 N.D. 432, 101 N.W. 183 (1904).

38. Engen v. Kincannon, 79 N.W.2d 160 (N.D. 1956); Reitsch v. McCarty, 35 N.D. 55, 160 N.W. 694 (1916). *But see,* Emanuel v. Engst, 54 N.D. 141, 208 N.W. 840 (1926), Laskin v. Lee, 50 N.D. 437, 196 N.W. 505 (1923) and Guild v. Moore, 32 N.D. 432, 155 N.W. 44 (1915), wherein the Supreme Court takes the position that, when taking into consideration the presumption of innocence and fair dealing, fraud need only be proved by a preponderance of the evidence.

39. Burr v. Kelley, 74 N.W.2d 428 (N.D. 1956); Mechtle v. Topp, 78 N.D. 789, 52 N.W.2d 842 (1952); Dean v. Smith, 53 N.D. 123, 204 N.W. 987 (1925); Miller v. Smith, 20 N.D. 96, 126 N.W. 499 (1910); and Jasper v. Hazen, 4 N.D. 1, 58 N.W. 454 (1894).

40. Hendrickson v. Syverson, 82 N.W.2d 827 (N.D. 1957); Shong v. Farmers' & Merchants State Bank, 70 N.W.2d 907 (N.D. 1955).

41. Ives v. Hanson, 66 N.W.2d 802 (N.D. 1954); Wilson v. Polsfut, 78 N.D. 204, 49 N.W.2d 102 (1951); Wheeler v. Boyer Fire Apparatus Co., 63 N.D. 403, 248 N.W. 521 (1933); Forester v. Van Auken, 12 N.D. 175, 96 N.W. 301 (1903)

42. N. D. Rev. Code § 29-2105 (1943). See also, State v. Myres, 67 N.D. 572, 274 N.W. 851 (1937); State v. Tucker, 58 N.D. 82, 224 N.W. 878 (1929); State v. Rice, 39 N.D. 597, 168 N.W. 369 (1918).

43. For a somewhat different view, see the comments of Professor McCormick, *infra* note 56.

"clear and convincing evidence" pertain to the quantity and quality of the evidence, apart from denoting any effect — or degree of effect — of the evidence on the mind of the trier, while proof "beyond a reasonable doubt" necessarily refers to the effect of the evidence on the mind of the trier.[44] The import of the words "preponderance of the evidence", as the courts commonly instruct, is the weight of the evidence which, as has been suggested, does not adequately direct the attention of the jury to the degree of belief that must be established in their minds to warrant a finding of fact in the proponent's favor.[45] It may also erroneously focus the attention of the jury on the evidence in a quantitative sense, rather than its persuasive effect. To illustrate, in *Guild v. Moore*, the Supreme Court of North Dakota, in defining "burden of proof", used the metaphor of a pair of scales as follows:

> ". . . when it is said that the burden of proof is on 'A,' that means that he will lose, unless he shall, at the close of the trial, have brought down his end of the scale, by placing thereon a weight of evidence sufficient, first, to destroy the equilibrium, and, second, to overbalance any weight of evidence placed on the other end."[46]

Even though it is implicit from the opinion of the court that the true test is the persuasive effect of the evidence,[47] such a formulation is completely misleading as to the meaning of "burden of proof" so far as a "preponderance of the evidence" is concerned.[48]

In North Dakota, as elsewhere, an instruction to the effect that "preponderance of the evidence" means the number of witnesses or the amount of the evidence introduced certainly would consti-

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44. See Morgan, *supra* note 35 at 512.

45. See McBaine, *Burden of Proof: Degrees of Belief*, 32 Calif. L. Rev. 242, 247 (1944).

46. 32 N.D. 432, 155 N.W. 44, 54 (1915).

47. The Supreme Court approved of the following instructions to the jury regarding the burden of proof: "The law says that unless, upon the various matters where I have stated that the plaintiff has the burden of proof, he satisfies you of the correctness of the facts as alleged by him to such an extent that his proof outweighs the proof of defendant, he cannot prevail in the instances where he has not so satisfied you. In other words, if the testimony is evenly balanced, it shows that there is some doubt in your mind; that is not sufficient; that is, if the testimony of the defendant weighs just the same as that of the plaintiff, you must find for the defendant upon that question." *Id.* at 53.

48. On this point, see also the comments of Professor Morgan: "And frequently the metaphor of a pair of scales is used either by counsel or judge or by both. The evidence of one party is pictured as being put in one pan and that of the other party in the other pan, and the pan which has in it the evidence of greater convincing force will tip the beam. No doubt this makes clear the concept that the evidence which has the greater convincing force preponderates regardless of volume, just as a small piece of gold in one pan would overbalance a mass of feathers in the others. But it may and is likely to convey the highly erroneous idea that the party who has produced evidence of greater convincing force has thereby satisfied the burden of proving or establishing. It is too plain for comment that if the party having the burden introduces evidence sufficient to justify a finding and the opponent rests without offering any evidence, the trier may find for the opponent. In this instance the evidence introduced must preponderate over none, no matter how preponderance may be defined." See Morgan, *supra* note 35 at 520.

tute prejudicial error.[49] "Preponderance of the evidence" necessarily refers to the persuasive effect of the evidence on the mind of the trier of fact and a respectable number of decisions so hold.[50] As to the requirement of "clear and convincing evidence" in North Dakota, analysis demonstrates that it is the intention to require a higher degree of proof than in the ordinary civil cases and,[51] in some, a higher degree of proof in terms of the belief of the trier, for example, such proof as will leave in the mind of the trier "no hesitation or substantial doubt."[52] But there is no uniformity in meaning, at least, if one can conclude such from the attempt on the part of the Supreme Court to define the test in terms of a degree of belief in some cases and content itself in others by stating only that the fact must be proved by "clear and convincing evidence" which refers only to the quality of the evidence. Only in the case of the test "beyond a reasonable doubt" is there a description of the state of mind of the trier of fact. And, interestingly enough, of the three tests, it is only in connection with the latter, that an opinion of the Supreme Court has been found in which the Court bluntly recognized that "reasonable doubt" was almost incapable of any definition which would add much to what the words themselves implied.[53]

If it is desired to retain the familiar terminology describing the degrees of proof, then it seems imperative that the tests be defined and foreclose any further opportunity to perpetuate the uncertainty and confusion attending their present usage. How should they be defined? Professor McBaine suggests that "[t]he 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 happened."[54] In this context it is believed that the degrees of proof would be more readily understood by judge and jury and facilitate a more rational application of them.[55] Consistent with his thesis, Professor

49. *Cf.* Shellberg v. Kuhn, 35 N.D. 448, 160 N.W. 504 (1916), wherein the Supreme Court rejected the plaintiff's contention that the trial court's definition of preponderance of the evidence led the jury to believe it meant the greater number of witnesses.

50. Kruckenberg v. Stanton Farmers' Co-op. Elevator Co., 59 N.D. 371, 230 N.W. 17 (1930). And, see further, Guild v. Moore, 32 N.D. 432, 155 N.W. 44, 53 (1915) and the Supreme Court's approval of the trial court's instructions dealing with burden of proof.

51. See, for example, Ives v. Hanson, 66 N.W.2d 802, 805-806 (N.D. 1954).

52. See, for example, Hendrickson v. Syverson, 82 N.W.2d 827 (N.D. 1957), citing Jasper v. Hazen, 4 N.D. 1, 58 N.W. 454 (1894) which so defines "clear and convincing evidence".

53. State v. Montgomery, 9 N.D. 405, 83 N.W. 873 (1900).

54. McBaine, *Burden of Proof: Degrees of Belief*, 32 Calif. L. Rev. 242, 246-247 (1944).

55. See Morgan, *Instructing the Jury Upon Presumptions and Burden of Proof*, 47 Harv. L. Rev. 59, 66 (1933).

McBaine proposes in a recent article that Uniform Rule 1(5) be amended to define the three degrees of proof as follows and it is suggested that North Dakota lawyers give serious attention to his proposal.[56]

"PREPONDERANCE OF THE EVIDENCE. When a rule of law now is, or hereafter shall be, that a party to a civil action or proceeding or a criminal prosecution has the obligation of proving facts by a preponderance of the evidence, the burden of persuasion is as follows:

The trier of fact 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."[57]

"CLEAR AND CONVINCING PROOF. When the rule of law is, or hereafter shall be, that a party to a civil action or proceeding or criminal prosecution has the obligation of proving facts by clear and convincing evidence, the burden of persuasion is as follows:

The trier of fact must believe that it is highly probable that the facts are true or exist."[58]

"PROOF BEYOND A REASONABLE DOUBT. 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, or a party to a civil action or proceeding, has or shall have the obligation of proving guilt of crime, or other facts, beyond a reasonable doubt, the burden of persuasion is as follows:

The trier of fact must believe beyond a reasonable doubt, or to a point of almost certainty, that the facts essential to constitute the crime charged are true or exist, or that the facts asserted in civil actions or proceedings are true or exist.

A reasonable doubt exists when after a comparison and consideration of all the evidence the trier of fact in a criminal prosecution is not convinced beyond a reasonable doubt or to almost certainty that the accused committed the crime with which he is charged; or in a civil action or proceeding is not convinced beyond a reasonable doubt or to almost certainty that the facts asserted 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 obligation of the prosecution, or a party to civil actions or proceedings,

56. *But see* McCormick, § 319, wherein he states, regarding the defining of "preponderance of the evidence" that "[m]ost courts sensibly hold that the phrase is one of common knowledge, and that it is not necessary to define it." Similarly, he concludes that the trial courts should decline to define "reasonable doubt" unless the jury requests an explanation (*Id.* at § 321), though he is persuaded that "clear and convincing evidence" might be more "intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is 'highly probable.'" (*Id.* at § 320)

57. McBaine, *Burden of Proof: Presumptions*, 2 U.C.L.A. L. Rev. 13, 17-18 (1954).

58. *Id.* at 18.

therefore, is not a burden of convincing the trier of fact beyond the possibility of a doubt; nor to a certainty."[59]

Professor Morgan has also recommended similar definitions for instructing the jury as to the meaning of "preponderance of the evidence"[60] and "clear and convincing evidence",[61] but has suggested that "attempts to define reasonable doubt by paraphrase or circumlocution tend only to obfuscate rather than clarify the concept".[62] Thus, he may disagree with Professor McBaine's attempt to elaborate on a term which he regards as carrying its own meaning. He has said, however, that "there could be no rational objection to charging . . . that the preponderance of probability must be so great as to banish all reasonable doubts."[63] This formulation may be regarded as preferable because of its simplicity and comparative relation to the other two definitions in terms of the degree of belief, that is, more probable than not, highly probable, or so probable as to banish all reasonable doubt.

Professor McBaine also proposes, in connection with each definition, that Uniform Rule 1(5) also be amended to include the instructions that may be given by the trial judge in defining the three burdens, though he would not require that they be given.[64]

It is believed that such modifications in Uniform Rule 1(5) would not constitute a radical departure from the existing law in North Dakota. Certainly, except perhaps in the case of "clear and convincing evidence", it would do no more than make explicit that which is implicit from a study of the North Dakota cases on the subject. But, to this extent, it might prove a more definite and thus helpful state of the law on the subject. For example, regarding the meaning of "preponderance of the evidence", in *Farmers' Mercantile Co.* v. *Northern Pac. Ry. Co.*, the Supreme Court very clearly adopts the view that to find a fact by a "preponderance of the evidence" means a finding that there is a greater probability

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59. *Id.* at 18.

60. "If the trial judge tells the jury that the burden is upon a party to prove a specified fact by a preponderance of the evidence, he should explain that this means only that they must find that the fact does not exist unless the evidence convinces them that its existence is more probable than is non-existence." See note 55 *supra* at 66.

61. "In like manner, if he charges that the burden is upon a party to prove a proposition by clear and convincing evidence, or by clear, satisfactory and convincing evidence, he should interpret this by saying that it requires the jury to be convinced not only that the truth of this proposition is more probable than its falsity, but also that its truth is much more probable than its falsity, though it is not necessary that the preponderance of probability of its truth shall be so great as to dissipate all reasonable doubt." See note 55 *supra* at 67

62. See note 55 *supra* at 63.

63. See note 55 *supra* at 67.

64. For the substance of these instructions, see McBaine, *supra*, note 56 at 18-12.

that a fact exists than it does not.[65] The Court, in quoting from an earlier Idaho case,[66] said:

> "A plaintiff is not bound to exclude the possibility that the accident might have happened in some other way. . . . He is only required to satisfy the jury by a fair preponderance of his evidence that his injury occurred in the manner he contends it did" and "where the evidence . . . is such that it would appear possible that the injury resulted from any one of several causes, and yet it points to the greater probability that it resulted from the specific cause charged by the plaintiff . . . the jury would be justified in returning a verdict in favor of the plaintiff . . ."[67]

Other decisions support the same view.[68]

The Supreme Court of North Dakota has not attempted to define "clear and convincing evidence" with particularity in the majority of cases in which this test has been required. In a few decisions involving suits to declare a deed a mortgage, to establish parol or constructive trusts, and to reform instruments on a basis of mutual mistake, the Supreme Court has said that "clear and convincing evidence" is such a degree of belief that it will leave in the mind of the trier of fact "no hesitation or substantial doubt."[69] One would, I should imagine, conclude that, by so defining "clear and convincing evidence", the Court comes dangerously close to requiring proof "beyond a reasonable doubt". It may be argued that, due to the nature of the issues involved, such was the intention of the Court, but it is not apparent from the decisions. The Court was defining "clear and convincing evidence" and there is no indication in the opinions that it was requiring what would be tanta-

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65. 27 N.D. 302, 146 N.W. 550 (1914).

66. Adams v. Bunker Hill & Sullivan Mining Co., 12 Idaho 637, 89 P. 624 (1907).

67. See note 65 *supra* at 555-556.

68. Trihub v. City of Minot, 74 N.D. 582, 23 N.W.2d 753 (1946); Reichert v. Northern Pac. Ry. Co., 39 N.D. 114, 167 N.W. 127 (1918); Rober v. Northern Pac. Ry. Co., 25 N.D. 617, 142 N.W. 42 (1913); and Meehan v. Great Northern Ry. Co., 13 N.D. 432, 101 N.W. 183 (1904). *But see,* Balding v. Andrews, 12 N.D. 267, 96 N.W. 305 (1903), an action for negligence in which the Court said that " 'to justify a verdict, the law requires not positive proof, it is true, but such proof as will leave no reasonable doubt of the existence of the fact upon which it must rest . . . if juries could assume their existence without sufficient evidence and render verdicts upon possibility, probability, and conjecture, the courts would be shorn of their legitimate authority, and the wise and just rules of the common law, as they have been recognized from time immemorial, would lose their principal value.' " The issue in this case was whether there was sufficient evidence to take the case to the jury and, North Dakota having rejected the scintilla rule, the language of the court can possibly be explained on this ground. However, to the extent that the court speaks of the necessity of a *finding* being based upon proof beyond a reasonable doubt, the opinion seems clearly erroneous, particularly in the view of the later cases, *supra,* even though this aspect of the *Balding* case has never been criticized.

69. Dean v. Smith, 53 N.D. 123, 204 N.W. 987, 991 (1925), a suit to declare a deed, absolute in form, to be a mortgage; Hendrickson v. Syverson, 82 N.W.2d 827, 833 (N.D. 1957), a suit to establish a constructive trust; and Forester v. Van Auken, 12 N.D. 175, 96 N.W. 301, 305 (1903), a suit to reform an instrument on grounds of mutual mistake.

mount to the degree of proof required in criminal prosecutions. If, of course, it was the intention of the court to apply this degree of proof then it should have boldly said so. It might be contended that the Court, by the phraseology, only intended no "considerable" or "large" doubt, as distinguished from no "reasonable doubt", but this is a nebulous distinction and somewhat ambiguous in itself. The meaning of "clear and convincing evidence" is further complicated by at least two cases in which the Court has gone so far as to suggest that a finding can be made "only upon the certainty" of the fact.[70] This, as already suggested, is to ignore the realities of the fact-finding process and demand even more than is required in criminal prosecutions. Needless to say, this is an area in which the North Dakota law could stand more definitive expression and Professor McBaine's definition of "clear and convincing proof" provides one answer. And, in the last analysis, to require a finding that a fact "highly probably" exists may not be too far removed from what the Supreme Court has in mind, if one keeps in mind the comparative degrees of belief approach that the Supreme Court clearly appears to adhere. This meaning of "clear and convincing evidence" is not, however, readily apparent from the decided cases.

How has "reasonable doubt" been defined in North Dakota?[71] In an early case, the Supreme Court defined it as "an abiding conviction to a moral certainty of the truth of the charge" and,[72] in a later decision, amplified this by stating that "a possible or speculative doubt" was not sufficient.[73] Even so, in the absence of a request, it is not error for the trial court to omit a definition of "reasonable doubt",[74] unless the failure to give an instruction amounts to a misdirection.[75] This is probably due to the attitude of the Supreme Court, as expressed in an early case, that the term is "almost incapable of any definition which will add much to what the words themselves imply."[76] Thus, even though the North Da-

70. Ives v. Hanson, 66 N.W.2d 802, 806 (N.D. 1954) and Wheeler v. Boyer Fire Apparatus Co., 63 N.D. 403, 248 N.W. 521 (1933), both suits to reform an instrument for mutual mistake.

71. For the statutory requirement of proof beyond a reasonable doubt, see N. D. Rev. Code § 29-2105 (1943). See also, State v. Myres, 67 N.D. 572, 274 N.W. 851 (1937); State v. Tucker, 58 N.D. 62, 224 N.W. 878 (1929); and State v. Rice, 39 N.D. 597, 168 N.W. 369 (1918).

72. Territory v. Bannigan, 1 Dak. 451, 46 N.W. 597 (1877).

73. State v. Liberman, 59 N.D. 252, 229 N.W. 363 (1930).

74. State v. Glass, 29 N.D. 620, 151 N.W. 229 (1915) (dictum); State v. Montgomery, 9 N.D. 405, 83 N.W. 873 (1900) (dictum).

75. State v. Gibson, 69 N.D. 70, 284 N.W. 209 (1939).

76. State v. Montgomery, 9 N.D. 405, 83 N.W. 873, 875 (1900); State v. Liberman, *supra* note 73.

kota definition of "reasonable doubt" does not differ materially from that suggested by Professor McBaine, the wiser course of action may be to adopt Professor Morgan's approach by simply defining it as "a preponderance of probability so great as to banish all reasonable doubt."[77]

(TO BE CONTINUED)

77. See page 213 *supra* and note 55 *supra* at 67.