ASPECTS OF THE BURDEN OF PROOF

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1. INTRODUCTORY REMARKS

THE BURDEN OF proof is a typical scholar's problem, being of such a complicated nature that it hardly lends itself to detailed regulation in statutes or exhaustive treatment in case law. At the same time this problem is of great practical importance, for questions about the burden of proof arise very often in court practice, even where this is not evident from the records. Very likely no problem of law has given rise to more diversity of opinion.[1] Fortunately the effects of this diversity are not as serious as one might have expected. It appears that the courts do not distinguish very clearly between different kinds of questions that have relevance to evidence and proof matters: they seem to regard the problem of "fact-finding" as a common-sense problem, a problem that calls for intuition more than for discursive thinking, and they seldom bother to inquire into doctrines.

The question may be asked whether this is a desirable state of affairs. A legal scholar, of course, must answer this question with an emphatic No. The problems mentioned are very often both so complicated and so important from practical points of view that they require deep analysis. In such circumstances it seems desirable that discussion among the scholars should go on until some sort of consensus is arrived at. On the other hand, we ought to take a lesson from the fact that court practice seems to have been able to cope with the burden-of-proof problem by regarding it from common-sense points of view. We must be careful not to overcomplicate the problem. We must approach it in such a way that there can be no mistake about the validity of our basic conceptions.

The following are remarks which are largely repeated from

[1] "Bei den Fragen der Beweislast ist fast nur das eine sicher, dass sie eine ausserordentlich grosse praktische Bedeutung haben." Leonhard, *Die Beweislast*, 2nd ed. Berlin 1926, p. 1. An illustration: The theories offered by Rosenberg (*Die Beweislast auf der Grundlage des bürgerlichen Gesetzbuchs und der Zivilprozessordnung*, 4th ed. München 1956) seem to be widely accepted in Germany (see Pohle's review, *Archiv für die civilistische Praxis*, 1956, pp. 165 ff.) but in Scandinavia they are generally rejected. They have been strongly criticized by Olivecrona (*Bevisskyldigheten och den materiella rätten*, Uppsala 1930).

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some studies that I have published in Swedish.[2] I should like to draw the reader's attention to the fact that my reflections on the matter are made on the basis of Swedish law, which knows no jury system and which consequently is not familiar with the Anglo-Saxon distinction between questions of law and questions of fact. The judge has to try evidence and proof matters as well as questions concerning the legal rule applicable. As my starting-point I take the following very simple proposition. The rules about the burden of proof have some reference to the question of *how risks of mistake on issues of fact are to be treated by the judge*. Further, I suggest that the rules about the burden of proof do not *necessarily* have anything to do with the question of *how risks of mistake can be avoided* (though they *may* have something to do with this question, if it can be presumed that some kind of rule about the burden of proof will have the effect that the party concerned will do his best to bring forward evidence; but in any case burden-of-proof rules do not always function in such a way). Furthermore, the rules about the burden of proof do not touch upon the question of *how great the risks of a mistake,* on a given issue, *actually are;* a distinction must be made between the evaluating of evidence on the one hand, and the charging of the burden of proof on the other. But it seems desirable, all the same, to start an investigation into the burden of proof with some comments on the methods of evaluation of evidence. For the rules about the burden of proof must, of course, be constructed in such a way that they can be applied adequately to the results that come out of evaluation of evidence. By studying the methods of evaluation of evidence we may arrive at ideas about the relevancy of some kinds of arguments that are offered in discussions about the burden of proof.

2. EVALUATION OF EVIDENCE — DOES THIS MEAN MAKING A CALCULATION OF PROBABILITY?

An estimation of the risks of mistake on issues of fact must, of course, be done on the basis of the knowledge possessed by the judge at the actual moment. His appreciation of the magnitude

[2] *Bevisbördan och den juridiska tekniken,* Uppsala 1951, *Har försäkringsfallet inträffat?,* Stockholm 1952, and "Sannolikhet och bevisvärdering i brottmål", *Sv.J.T.* 1953, pp. 305 ff. Valuable criticism of my writing has been offered by Ekelöf, *Sv.J.T.* 1952, pp. 216 ff.

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of the risks must follow from an evaluation of the evidence actually before him. But how is this evaluation done? Is it reasonable to say that the court, when evaluating the evidence, makes some kind of calculation of probability?

The answer to that question must of course be No, if the rule is that the judge has to take note of certain *formalia* (for instance that the number of witnesses are two or more) and is obliged to make his decision on the issues of fact after having registered these *formalia* (in accordance with the Swedish Code of Procedure of 1734 which laid down that two witnesses were "full proof"). But will the answer be Yes if we apply the same question to those systems (nowadays almost universal) that use a method of free evaluation of evidence *(freie Beweiswürdigung)*?

There are good reasons for believing that this is the case. But let us argue the question in some detail.

It does not seem realistic to treat matters of evidence and proof occurring in court practice as having special characteristics just because they have connections with the legal system. The judge must—in the same manner as, for instance, a historian—use both common sense and, as far as possible, scientific reasonings in making up his mind on issues of fact. And both in common-sense reasonings and in scientific argumentation, questions of fact are discussed as probability questions.[3] Moreover, the judge often has to combine evidence that can be appreciated only from common-sense points of view with evidence that is of a more scientific nature. Take for instance the case of paternity evidence: it may be necessary for the judge to arrive at a result on the one hand from a statement by a party about certain alleged sexual intercourse, and on the other hand from the results, often in the form of probability statements, of blood-group investigations. How can such facts be evaluated together if the whole process of thought is not to be regarded as some kind of a calculation of probability?

But it cannot be denied that there are many difficulties connected with the idea that evaluation of evidence may mean that one has to make a calculation of probability. Some of these difficulties will now be indicated.

a. Every code of judicial procedure contains some rules about inadmissibility of evidence. It happens rather often that for some reason such material will be presented nevertheless. Then

[3] See Russell, *Human knowledge. Its scope and limits.* London 1948, pp. 356 ff.: "Kinds of probability."

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the judge is permitted to pay regard only to certain parts of the material actually at his disposal. Does that agree with the hypothesis that the evaluation has the character of a calculation of probability? The answer seems to me to be Yes. For one of the characteristics of such a calculation is that it can be made on the basis both of the whole knowledge that is at the disposal of the person who makes the calculation and on the basis of only some part or some parts of that knowledge. So it might well be possible for the judge to evaluate, in the form of a calculation of probability, the evidence while disregarding certain parts of the items of his actual knowledge. In any case it seems to be more satisfactory to regard the evaluation of evidence as a calculation of probability than to regard it—as is sometimes done—as a method of arriving at "convictions" or "beliefs". If the result of the evaluation were to be considered not a notion on probability but some kind of "conviction" or "belief", how would it be possible for the judge to disregard information which he actually has but by which he may not allow himself to be influenced? And what about circumstantial evidence? Suppose that it has been possible to find only four points of identification in a matter of finger-print evidence. According to statisticians the risk of mistake is then 1: 256.[4] Is it reasonable, then, for the judge to put to himself the question whether he has, or has not, arrived at a "conviction" or "belief" from that evidence? I would say that it is not only unreasonable, since he can gain no further knowledge while doing so, but also dangerous. For it might induce him to exchange careful considerations for loose thinking.

b. Another difficulty arises from the fact that in complicated cases there may be quite a number of different issues of fact interwoven with one another. But it does not seem that this difficulty need affect our choice of views. It is, of course, often both possible and necessary to distinguish different issues from one another in such a manner that every one of them can be made an object for a special calculation of probability (and can be governed by a special rule about the burden of proof). And in cases where such distinctions are not possible or not to be recommended the evaluation of the evidence seems to take the form, if more closely analysed, of a comparison between different groups of hypotheses that are actualized by the issues. Let me illustrate this by an example borrowed from François Gorphe:[5]

[4] See Gorphe, *L'appréciation des preuves en justice,* Paris 1947, p. 345.
[5] Gorphe, *op. cit.,* pp. 279 f.

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A woman was prosecuted for murder. It was suggested that she had killed her husband and her brother-in-law by giving them poison. The evidence against her seems to have been mainly that she had, on many occasions, maltreated and threatened both the deceased ("my husband will die young") and that she was the only one, except the deceased, who had access to the lodgings where the deaths took place. She was found guilty and sentenced to imprisonment for life. Eight years later, however, it was found out that another person had died in the same lodgings, and it then became evident that accidental gas poisoning was the cause of death not only in the latter case but also in the case for which the woman had been tried.

To arrive at a tenable result in the evaluation of the evidence in this case, the judge had to make a comparison between two groups of hypotheses: on the one hand the hypotheses upon which the prosecutor based his charge, and on the other all kinds of conflicting hypotheses. Let us suppose that the judge put the following questions to himself: Could the men have taken poison by accident? Could they have committed suicide? Could it have been murder, committed by someone else than the woman under prosecution? As there were good reasons to answer all these three questions with No, it was easy to jump to the conclusion: It must be murder, committed by the woman! The evaluation of the evidence became, so it seems, unsatisfactory just because the judge did not consider all the possibilities; it did not enter his mind that the deaths could have been caused by gas poisoning.[6]

c. But, and here comes the most crucial point, is it really

[6] The importance of forming theories is, of course, especially great during the investigatory phase. A new theory often indicates a new line of investigation, and such an investigation, in turn, often leads to new evidence which may fundamentally change the basis of knowledge upon which the probability calculation is to be made. But the importance of a theory does not end when there is no further possibility of arriving at new evidence. It is necessary also to take account of the theory as an element when the evaluation of the evidence is to be done. It has been pointed out by Williams (*The proof of guilt*, 2nd ed. London 1958, p. 158) that it cannot be held against the administration of the law that "unlikely contingencies" do sometimes occur: an example offered by Williams is that "some stranger, of whose existence there is no evidence, interposed at the crucial moment and actually committed the crime, when all the evidence points to the fact that the accused was alone on the spot". I agree with this view, but I think that it is important that the judge should not disregard the possibility of such contingencies *while evaluating the evidence* (sometimes a number of unlikely contingencies may, when accumulated, add up to a rather high degree of probability). Another thing is that the *rules about the burden of proof* (see next section) cannot be so constructed as to cope with every kind of extraordinary circumstance that would be consistent with the innocence of the accused.

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permissible to regard evaluation of court evidence as being synonymous with making a calculation of probability, since it is a fact that many elements of evidence cannot be measured numerically? The answer to this question seems to me to be as follows. All elements of evidence, if they are to be considered relevant at all, must be of such a character that they can be, at least roughly, measured against the background of our knowledge of frequencies. Suppose, for instance, that a witness has stated: "I am not at all sure, but I think that this is the man." Of course it is quite impossible to assign any numerical value to the credibility of such a statement. But as we have some knowledge of the frequencies of different kinds of mistakes in different kinds of depositions, we may perhaps come at least to the result that there is a preponderance of probability for the supposition that the statement of the witness is correct. If this is the case, the statement really is a contribution to our knowledge of the facts in issue. And, of course, sometimes it is possible to find out more by inquiring further into the foundation of the witness's belief. But such an inquiry ought not to consist in an investigation into the witness's "feeling of certainty" or something of that kind but ought instead to concentrate on details of perception. Suppose, for instance, that it can be found out that his statement about identity is based on observations about age, colour of hair, and gait (the man whom the witness observed was, like the defendant, about 20 years old, fair-haired and stooped as he walked), does it not from that follow that we can make a rough calculation that in principle has the same character as the judgment imbedded in a calculation of probability as performed by statisticians? And is it not desirable that we should try to do so? Is it not very true—as has been pointed out by a famous judge[7]—that "the mind in doubt ever turns to tangible objects"? And is this not a tendency that we must, as far as possible, avoid if we want to achieve a realistic appreciation of the risks of mistake and if we want to avoid the courts shifting their responsibility on to the witnesses? Is it not necessary that we should regard depositions in the same detached way as we regard so-called circumstantial evidence? And, if so, is it not necessary that we should refrain from "believing" or "disbelieving" witnesses and try, instead, to appreciate their importance in the light of what can be said from a scientific

[7] Charles J. Darling. Quotation from Wigmore, *The principles of judicial proof*, 2nd ed. Boston 1931, p. 650.

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point of view about frequencies of different kinds of mistakes in witnesses' perceptions?

I have ended this section with many questions. I am certainly not able myself to contribute to their solution. But my impression is that there are good reasons for answering in the affirmative the question in the heading of this section. Anyway I shall assume, in the following sections, that evaluation of evidence does really mean making a calculation of probability, and that, as this is the case, the result of the evaluation can be given, roughly, in the form of a statement about the probability of hypotheses about facts which are relevant to the issue.

3. RULES ABOUT THE BURDEN OF PROOF — ARE THEY RULES ABOUT THE DEGREE OF PROBABILITY REQUIRED?

It often happens that the result of the evaluation of the evidence is that the probability of a certain hypothesis is either very low or very high—so low or so high, indeed, that there can be no doubt about what the judge ought to do: he can easily dismiss or accept the hypothesis which the evidence is supposed to support.

But let us take a case that presents the judge with difficulties. Suppose that the evaluation of the evidence has given the result that there is a rather high, but seemingly not very high, probability for the hypothesis that the fact X has taken place.[8] Does it follow that the judge can automatically make the existence of X a basis for his further treatment of the case that he has to decide? No: for it is quite possible that there is some legal rule (some rule about the burden of proof) that requires a higher degree of probability for the fact X than the degree that must be arrived at in order that it shall be presumed that X has taken place. Let me illustrate this by the following sketch, where I have indicated the result of the evaluation of the evidence on a scale

[8] In everyday language we often talk about probability as referring to facts. Possibly it would be more correct to relate statements about probability to *hypotheses about* facts. But I shall not aim at any exactitude in this terminological respect.

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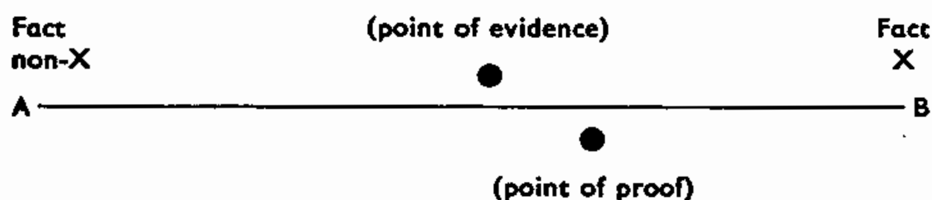
A to B with a "point of evidence" and the localization of the burden of proof rule with a "point of proof":[9]



Evidently the fact X cannot be accepted by the judge if the point of proof is located somewhere to the right of the point of evidence. Accepting the theories mentioned in the preceding section, we can say in a purely general way that the judge must choose among different answers to questions of fact after having made up his mind about both points of evidence and points of proof. It further seems to follow that the answer to the question in the heading of this section must be Yes. For it seems evident that rules about the burden of proof must regulate the situations that have arisen as results of the evaluation of the evidence. If the evaluation actually consists in making a calculation of probability it seems necessary that the rules about the burden of proof must be rules about the degree of probability required.

The next question, then, is whether it is possible to localize a point of proof not only within the outer sectors of the scale of probability but also somewhere in the middle of the scale. This does not seem reconcilable with the classical view of the burden of proof, which is that the judge may find himself, after having made the evaluation of the evidence, in one of three different situations. About the fact X he may have arrived at the conviction (1) that it does not exist, or (2) that it does exist, or (3) that there is uncertainty about its existence. This view, of course, implies that the rules about the burden of proof are, to a very large extent, schematical and that every such rule must, if we try to relate it to the sketch given above, place the point of proof either very far to the left or very far to the right on the probability scale. The following decision of the Swedish Supreme Court illustrates this.

G. Karlsson v. *E. Sandell,* 1951 N.J.A. 1. The plaintiff had built a house for the defendant and claimed payment for his work. The

[9] It should be observed that no conclusions ought to follow from the fact that in the sketch one of the alternatives is described by the prefix "non". Indeed it seems that when we describe a fact (or groups of facts) negatively we often do so only to avoid certain linguistic difficulties, for instance the difficulty of finding positive terms that have an adequate scope.

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defendant alleged that the parties had agreed upon a payment that was lower than that claimed by the plaintiff. The question was whether or not such an agreement existed. The case was decided by the Supreme Court *in pleno.* The majority found for the defendant as the plaintiff had not been able to disprove the statement of the defendant that agreement had been arrived at. The minority founded their dissenting opinion on the view that the defendant could not be regarded as having proved the said statement.

It seems that in this case the majority and the minority did agree in the opinion that a burden of proof must be carried by *one party or the other* and that it was not possible to compromise on any rule that required, from one party or the other, only some slight overweight of probability.

It would surely be wrong, however, to conclude from this case that the point of proof must, in all kinds of cases, be located either far to the left or far to the right on the probability scale. Swedish statutory rules are sometimes so worded as to indicate that some kinds of proposition can be proved by rather slight evidence. And it might be argued that even in cases where this does not follow from statutes such facilitation is sometimes allowable.

But it may be asked whether it is not possible, and sometimes desirable, to go one step further in facilitating burdens of proof. That would mean accepting a "principle of preponderance",[1] by which term I shall indicate a rule that places the point of proof exactly in the middle of the probability scale. The consequences of such a principle would be, in cases where it was to be applied, that any kind of preponderance of probability, even the slightest, would be enough to allow the judge to accept the hypothesis supported by the preponderance.

4. THE POSSIBILITY OF ADOPTING A PRINCIPLE OF PREPONDERANCE

I have not been able to find any Swedish court decision that can be said, without doubt, to support the theory that it is permissible

[1] The arguments for such a principle have been closely investigated by Eckhoff whose works *Tvilsrisikoen,* Oslo 1943, and "Noen ord om bevisbyrde og bevisbyrdeteorier", *T.f.R.* 1949, pp. 298 ff., mark, in my opinion, a new departure. See also Ekelöf, *Kompendium över civilprocessen,* Vol. II, 2nd ed. Uppsala 1952.

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to apply a principle of preponderance. It is, however, possible that the following opinions fall in line with the said theory.

Södra Rörums församling v. *T. Svensson,* 1898 N.J.A. 479. The defendant, a contractor, had built a church for the plaintiff (a parish of the Swedish State Church). One of the questions in the case was whether the roof of the church had been defective at the time when the defendant was still responsible for its condition. One of the members of the Supreme Court, Mr. Justice Lindbäck, found, in a dissenting opinion, that this question ought to be answered in the negative since the plaintiff could be considered as having "proved with preponderant evidence" *(med övervägande bevisning styrkt)* that the roof was really, at the relevant time, defective.

T. Rolf v. *Svenska Livförsäkringsbolaget,* 1936 N.J.A. 439. The plaintiff, whose husband was deceased, demanded, as holder of a life insurance policy, payment from the defendant, a life insurance company. The submission of the defendant was that the death of the plaintiff's husband was due to suicide. It was held by the Supreme Court that the defendant had to pay because "preponderant reasons" *(övervägande skäl)* indicated that Rolf (the plaintiff's husband), when carrying out the actions that led to his death, did not intend to take his life but only intended to give rise to the impression that such an intention was held by him.

M. Järnkrok et al. v. *Hyreshus i Stockholm aktiebolag,* 1959 N.J.A. 318. The husband of the plaintiff had died from heart failure. It was alleged that his death was due to an accident which had occurred two years previously while he was working for the defendant. An exhaustive medical investigation was submitted. The Supreme Court found that "preponderant reasons" *(övervägande skäl)* indicated that the death was a consequence of the accident.

It does not seem possible to argue, with certainty, that in the opinions mentioned the judges concerned intended to rule that a principle of preponderance should apply. For it might be that the wordings were meant to refer to the evaluation of the evidence exclusively and thus only indicated where the point of evidence was situated on the probability scale. On the other hand, the principle of preponderance may very well, theoretically, have been accepted by court practice in many cases without any indication thereof in the wordings of decisions or opinions. It is, for instance, possible that in cases where the court has declared that some fact has been "proven" the court has arrived at that result on the foundation of only a very slight preponderance of evidence. As long as the judges do not deal with this matter in the reasons presented in their opinions it must be considered as

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an open question how far a principle of preponderance has been adopted by the courts.

Let us, then, argue the question as a theoretical one, using the following case as a point of departure.

> *W. Enqvist et al.* v. *A. Svensson et al.,* 1949 N.J.A. 144. At a hospital two boys, Valter and Bo, were born at the same time. One of the boys was delivered from Vilma Enqvist, the other from Dagny Svensson. When leaving the hospital Vilma took with her the boy Valter and Dagny took the boy Bo. After some years had passed, the parents began to suspect that Valter was, really, the son of Dagny and *vice versa.* A thorough investigation having been made by experts—*inter alia* an anthropological investigation—it was found to be "reliably established" *(tillförlitligen utrett)* that the two boys had been confused with each other immediately after birth. And it was held that the parents should exchange the children.

Undoubtedly the court must have applied a rule about the burden of proof in this case, a rule that required a very high probability for the hypothesis that the children had been confused with each other. And the reason for such a rule seems quite clear. It would, of course, have been a tragedy if each of the boys had, after having lived for years in a certain family group, been taken by mistake out of that group and forced to join another one. And—this seems to me the main point—the inconvenience of such a solution can be judged to be much greater than the inconvenience of a mistake in the other direction, i.e. a mistake that would have resulted in maintaining, wrongfully, the existing family relations.

But let us reflect upon a possible variation of the case mentioned. Suppose that, immediately after the births, there seemed to be ground for suspicion that the boys had been confused with each other. Suppose, further, that both the women claimed to have given birth to the boy Valter (perhaps the more attractive-looking of the two children). Here the factor of milieu is completely eliminated and there does not, indeed, seem to be any reason at all to put a burden of proof on either of the women. And what else is left—since the case must, of course, be solved—but to accept the principle of preponderance and give Valter to the one who could be considered, with preponderant probability, as being his mother?

From these two examples—the actual case and the variation of it—can be inferred, in my opinion, that it would be unwise to abolish, completely, the principle of preponderance and that it

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would also be unwise to regard the principle of preponderance as generally applicable. As to the last-mentioned reservation, I think that it is very probable indeed that further analysis would show that the principle of preponderance cannot be used in any great number of cases, as there will almost always be arguments for requiring a high degree of probability for one of two conflicting hypotheses. But even if this is the case I do not think that it is advisable to treat the principle of preponderance as an alternative of rather slight interest. I think, indeed, that there are reasons for using this principle as some kind of starting point in discussions about the burden of proof.

My arguments for this proposition are as follows. When discussing problems concerning the burden of proof it seems to be a reasonable starting point when considering a case to put the following question: Are there any reasons in this kind of case for making use of some type of rule about the burden of proof that presupposes that I shall have to accept hypotheses that are less probable than other, conflicting, hypotheses? Indeed, this seems to me to be a good test. The principle of preponderance implies that the court shall take notice only of hypotheses that are founded on preponderant evidence. Every principle according to which the point of proof is located on the right part of the scale implies *at the same time both* that a higher degree of probability is required for the acceptance of the hypotheses supporting the existence of the fact X *and* that a lower degree of probability is sufficient for the hypotheses supporting the existence of non-X. And does it not seem reasonable, when this is so, to require some kind of relevant argument for every sort of rule that puts a burden of proof on any of the parties? Moreover, is it not probable that in taking the principle of preponderance as our starting point we might find it easier to discover what kinds of arguments are to be considered relevant in discussions about the burden of proof?

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5. WHAT KINDS OF ARGUMENTS ARE TO BE CONSIDERED RELEVANT IN DISCUSSIONS ABOUT THE BURDEN OF PROOF?

In my approach to the problem set out in the heading I take the liberty of presuming that I have arrived at a tenable position in holding the evaluation of evidence to consist in making a calculation of probability and in regarding rules about the burden of proof as rules that require a degree of probability other than a preponderance. I also presume that nothing can be said against discussing burden-of-proof problems while referring them to a probability scale as I did under section 3 when talking about "points of evidence" and "points of proof". From these presumptions there seem to follow two consequences that are worthy of notice in this section.

The first consequence is that it cannot be considered a relevant argument for any kind of rule about the burden of proof that the courts with its help will avoid meeting difficulties when they have to form their opinions on issues of fact. Wherever on the probability scale we put the point of proof—whether in the middle of the scale or at some place to the right or the left of the middle—difficulties are apt to arise whenever the point of evidence seems to come in the neighbourhood of the point of proof. Take a criminal case: for obvious reasons here the point of proof is located far to the right of the probability scale (if X is meant to symbolize a proposition that a crime has been committed) but this does not imply that the judge will be relieved from doubts. In fact, doubts arise in cases where the evidence is rather strong but not so strong that it seems absolutely certain that the crime has been committed. I think that it is really of some importance to notice the circumstance referred to. For it is often very tempting to argue loosely in these matters. It happens, for instance, that a scholar, after having considered some sort of material legal rule, says to himself: "This rule certainly will actualize difficult problems concerning the facts; it seems necessary, therefore, to take up a position on the question which of the parties ought to carry the burden of proof." A reasoning of this kind is, indeed, unsatisfactory as it presupposes that it is out of the question to apply a principle of preponderance.

The second consequence is that considerations about probability

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ought not to be considered relevant in discussions about the localization of the point of proof. For it seems clear that all considerations of such a kind ought to be exhaustively examined when the calculation of probability is made. Let me illustrate this by an example:

Svedbergh v. *von Rosen*, 1948 N.J.A. 554. The plaintiff, a seller of fur coats, sued for payment. The defendant, Countess von Rosen, objected that the date of maturity had not arrived, the plaintiff having granted her a credit of ten years. It was held by the District Court that "the conditions of payment alleged by Barbro von Rosen are so uncommonly favourable that it must rest upon her to prove them". (The opinions of the Court of Appeal and of the Supreme Court do not afford anything of interest in this connection.)

From the words of this decision it would seem that the court let some kind of *prima facie* view be considered as a reason for the localization of the point of proof. But it does not seem satisfactory to treat the matter in such a way. The fact that credit is very seldom granted for such a long time as ten years must be taken into account in the evaluation of the evidence and it cannot be deemed of importance in relation to the burden of proof also. Indeed it seems that the court in this case did confuse the problem of the burden of proof with the problem of the "burden of going forward with the evidence" (the actual necessity, at a given time, to present new evidence if the case is not to be lost), which certainly is quite a different thing. The point of proof must in all kinds of cases be independent of considerations about the strength of actual evidence. It must be fixed in advanced and should not be allowed to change with the activities of the parties while putting forward evidence. The point of evidence, on the other hand, is variable throughout the proceedings, and from this it follows that it is always in the interest of one or other party, considering the actual location of the point of evidence, to put forward new evidence. And as notorious facts, such as the uncommonness of ten-year credits, belong to the compacts of evidence, it sometimes happens that even a party that has the benefit of a burden-of-proof rule must be the one to start offering evidence.

Further, it would seem that rules about the burden of proof, as defined in the preceding analysis, do not necessarily have anything to do with the duties of the parties to invoke the issues of fact that are to be considered by the court. It seems that in

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many cases the duty to make an invocation rests with the one party while it is the other party that has to carry the burden of proof. Under the Swedish Motor Accidents Act, 1916, for instance, the owner of a car carries the burden of proof in matters of negligence, but of course the negligence issue must be invoked by the party that alleges that the owner has acted negligently. It would seem that questions of invocation (Germ. *Behauptungslast*) have to be distinguished from questions concerning burden of proof, although both types of questions naturally have many aspects in common.

Then, what kinds of arguments can be deemed relevant in discussions about the burden of proof? It seems to me that all such arguments can be regarded under one and the same aspect. For they are arguments that imply that the risk of mistake in one direction are, when all relevant circumstances are taken into consideration, more unsatisfactory than mistakes in the opposite direction. This seems, indeed, to be a necessary consequence from the analysis presented in the foregoing sections. If we say that one hypothesis (A) is more probable than another, conflicting, hypothesis (B) we must by that mean that we have the best chance to avoid a mistake if we accept alternative A. And as the principle of preponderance implies that alternative A is the one to be chosen, every burden-of-proof rule must, since it disagrees with the said principle, be based upon some argument implying that risks of mistakes are to be treated unequally.

Supposing this approach to be a good one we have not, of course, arrived at any results about how different rules about the burden of proof are to be drafted or, to be more precise, what reasons may carry them; we have only managed, at the very best, to eliminate some sorts of confusing ideas and to find a point of departure for further inquiries.

But what ought to be the objects of such further inquiries? What kinds of arguments may tend to give us the view that, out of two possible kinds of mistake, one is to be regarded as more inconvenient than the other? These are difficult questions. I do not think, however, that it is possible to find any way around them. Indeed, we cannot get to grips with the burden-of-proof problem unless we consider it as a problem of risk distribution and unless we face the troubles that attend such a distribution.

It seems certain that we have, sometimes, very good reasons to argue that a mistake of one special kind is much more unsatisfactory than a mistake of another kind. This seems to be the case,

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for example, in all—or almost all[2]—criminal matters. It must be carefully avoided that persons who have not committed any crime shall be found guilty by the courts; it does not matter so much, on the other hand, if it happens sometimes—or even rather often —that persons who are in reality guilty are acquitted. In many civil matters, also, it is immediately evident that rules about the burden of proof are required to prevent mistakes of one special kind (mistakes of an opposite kind being more tolerable). But of course the arguments that seem to be relevant here cannot, except to some extent, be generalized. There seem to be some arguments that have a rather wide scope, for instance the argument that burden-of-proof rules are required if we want to achieve a certain degree of stability[3] in the relations between citizens (from this point of view it seems, for instance, that it is less satisfactory that a claim for restitution shall be wrongly admitted than that it shall be wrongly dismissed). It might also be suggested that burden-of-proof rules are sometimes required because we want to influence the mode of behaviour within a special group of people; it may happen, for instance, that contractors, knowing themselves to be obliged to carry the burden of proof, e. g. on the question whether a price has been agreed upon or not, are induced to be more careful when making their contracts, from which it may follow—among other consequences—that questions concerning what a contractor may charge will not so often be left in doubt as would be the case if a principle of preponderance were to be applied.

In the main, however, it seems to be necessary to come to the conclusion that rules about the burden of proof must be constructed in accordance with considerations that are very specific and that are adapted to individual circumstances in the same way as the material rules are. It seems unavoidable that material rules must very often be such that mistakes in their application may

[2] In the case *Criminal Prosecutor* v. *Alerstam*, 1948 N.J.A. 675, the facts were as follows: An elk had been shot at by the defendant and had been found dead on territory where the defendant had no right to hunt. The defendant pleaded not guilty, asserting that the elk had been mortally wounded while it was still on territory where the defendant had a hunting right. It was held that the burden of proof on the last-mentioned point must be carried by the defendant. Here, of course, the interests of protection of wild life may seem to have required an exceptional rule about the burden of proof. But it may be asked whether those interests are really so strong that they can justify moving the point of proof all the way from one part of the scale of probability to the other.

[3] See Eckhoff, *Tvilsrisikoen*, pp. 122 f.

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be specially dangerous or unsuitable if they are made in one particular direction. Therefore it seems necessary that the burden-of-proof problems shall be regarded together with the basic problems that are of importance under the material rules. A scholar who occupies himself with rules about procedure cannot, in his capacity as such, give recommendations about burden-of-proof problems except as regards the way to approach them. I think, indeed, that it is due to this circumstance that we owe a good deal of the obscurity that attaches to the questions about the burden of proof. Specialists in the field of material (civil, criminal etc.) law have not troubled to inquire very deeply into the fundamentals of the problem, and specialists in the field of procedural law have not been able to raise the arguments that must be considered relevant when the problem is investigated in greater detail.

The suggestions given in this article have left many problems wide open. One may ask, for instance, to what extent it is possible to differentiate rules about the burden of proof. Is it necessary, or advisable, that we should use (and find adequate expressions for) quite a number of different degrees of probability in this connection? It seems to me that this question, too, cannot be answered generally. In most kinds of situations there seems to be so little chance of regarding evaluation of evidence in accordance with exact notions that we cannot hope to achieve any results by making differentiations. But there are certainly types of cases where degrees of probability can be calculated more precisely. And the progress of the natural science may result not only in helping us, on the whole, to arrive at higher degrees of probability but also in helping us to calculate more precisely in cases where there are, unfortunately, great risks of mistake.

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