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Comment

EVIDENCE: CLEAR AND CONVINCING PROOF: APPELLATE REVIEW

While "the keystone of our system of administering justice is the trial judge,"¹ the foundation of the system is adherence to precedent established by appellate courts. If trial judges should be free to propound their own rules and standards, the decisions reached in lawsuits, in many cases, would depend upon the views of the judge who happened to be sitting upon the bench at the time of the trial.²

Although the authority of precedent is firmly established in the law, there are some situations where the trial judge is the final arbiter. In many cases this is as it should be, for he is in a better position to decide the question than the appellate court. However, in other situations, appellate courts have left matters to the discretion of the trial judge that should be decided by them. Rules of law should be enforced, or be altered or be abandoned. To permit a trial judge to apply a rule of law in any manner he sees fit destroys the force of the rule. Appellate courts may pay lip-service to a rule and it may be set forth in profound language in the reports and restatements, but if trial courts may disregard it without reversal, the rule is without effect.

¹MORGAN, Foreword to the MODEL CODE OF EVIDENCE (Am. L. Inst. 1942) 7.

²"For it is an established rule to abide by former precedents, where the same points come again in litigation: . . . to keep the scale of justice even and steady, and not liable to waiver with every new judge's opinion. . . ." 1 JONES' BLACKSTONE (1915) 117.

The overwhelming majority of the courts in the United States require a higher degree of proof in certain types of civil cases than is required in ordinary civil suits.³ This degree of proof is usually denominated "clear and convincing proof."⁴

The precise meaning of "clear and convincing proof" does not lend itself readily to definition. It is, in reality, a question of how strongly the minds of the trier or triers of fact must be convinced that the facts are as contended by the proponent. In the ordinary civil suit, the proponent must persuade the jury (or judge, if there is no jury) that the facts are more probably true than not true. Where clear and convincing proof is required, the proponent must convince the jury or judge, as the case may be, that it is *highly probable* that the facts which he asserts are true. He must do more than show that the facts are probably true. Where the trier of facts finds certain things to be true, he can only find what probably has happened. If the probabilities are equal, the litigant with the burden of proof must fail—even in the ordinary civil suit. If the probabilities are little higher than those of his opponent, the proponent should win in the ordinary civil suit, but he should fail where he is required to prove his case by clear and convincing proof. His evidence, where this rule appears, should establish that the probabilities are great that the facts which he asserts exist, do exist.

Some courts, for example, require the litigant bearing the burden of persuasion to show by clear and convincing proof that a deed absolute on its face is in reality a mortgage,⁵ to establish a constructive or resulting trust,⁶ to prove the existence and contents of a lost deed⁷ or will⁸ or to prove an oral contract as a basis for specific

³The rule is so well established that endless citation of cases serves no purpose. Cases may be found in: 1 JONES ON MORTGAGES (8th ed. 1928) § 343; 9 WIGMORE, EVIDENCE (3d ed. 1940) § 2498; 20 AM. JUR. 1103; 23 C. J. 24; 32 C. J. S. 1059; Notes, (1923) 23 A. L. R. 1500; L. R. A. 1916B 18, 192; (1938) 16 N. C. L. REV. 416; (1930) 15 IOWA L. REV. 192.

⁴Courts state the requirement of a higher degree of proof in various ways, the most common of which are: "clear and convincing proof," "clear, satisfactory and convincing evidence," "clear, cogent and convincing proof," "clear, precise and indubitable," "explicit and convincing," and similar combinations of these terms. They all are meant to require a greater degree of proof than a preponderance of the evidence.

⁵Chinn v. Llangollen Stable Inc. (C. C. A. 6th, 1940) 109 F. (2d) 66; Coutts v. Winston (1908) 153 Cal. 686, 96 Pac. 357; Hawkins v. Elston (1915) 58 Colo. 400, 146 Pac. 254; Brennan v. Finn (1922) 217 Mich. 584, 187 N. W. 353; Nicolls v. McDonald (1882) 101 Pa. 514; Smyth v. Reed (1904) 28 Utah 262, 78 Pac. 478.

⁶Harris v. Gurley (C. C. A. 5th, 1936) 80 F. (2d) 744; Wehle v. Price (1929) 202 Cal. 394, 397, 260 Pac. 878; Goodfellow v. Goodfellow (1933) 219 Cal. 548, 554, 27 P. (2d) 898, 901; Nelson v. Wood (1940) 199 Ark. 1019, 137 S. W. (2d) 929; White v. Mayo (1931) 35 N. M. 430, 299 Pac. 1068; Page v. Page (1922) 132 Va. 63, 110 S. E. 370.

⁷Posten v. Rasette (1855) 5 Cal. 469; 7 WIGMORE, *op. cit. supra* note 3, § 2105.

⁸CAL. PROB. CODE (1941) § 350 ". . . no will shall be proved as a lost or destroyed will . . . unless its provisions are clearly and distinctly proved by at least two credible

performance.⁹ This measure of persuasion is also required to prove an agreement to bequeath property by will,¹⁰ an agreement to adopt,¹¹ and to prove that property acquired after marriage is not community property,¹² and so forth. The problem of formulating instructions to the jury which state the meaning of clear and convincing proof has proved difficult.¹³

The requirement of clear and convincing evidence is based upon policy considerations. Charges of some types are easily made, but are difficult to disprove. They may be used by litigants to perpetuate a fraud. It is to safeguard parties defending against such charges that the proponent is required to prove them by clear and convincing proof. The requirement is a meritorious one and should be enforced.

Although some courts state that the proof in such cases as these must be established beyond a reasonable doubt, this is a minority view and this phrase is generally not meant in the sense in which it is used in criminal cases.¹⁴

In the ordinary civil suit, the trial court should direct a verdict against the proponent if he does not produce "substantial evidence" to support his case.¹⁵ "Substantial evidence" can only mean that the facts asserted are *probably* true, and when a verdict is directed, the trial court holds that a reasonable jury cannot find that the facts asserted *are* probably true. The California Supreme Court has found no difficulty in holding that the refusal of the trial court to direct a verdict is error where there has been no substantial evidence.

Why then should an appellate court balk when a losing litigant contends that the proponent's case is not established by the necessary clear and convincing evidence. If we are to give meaning to the phrase "clear and convincing proof," it must mean that the propo-

witnesses." Many states have similar statutory provisions. See WIGMORE, *op. cit. supra* note 3, § 2106.

⁹MacQueen v. Anderson (1916) 275 Ill. 409, 114 N. E. 159; Boyers v. Boyers (Mo. 1941) 147 S. W. (2d) 473.

¹⁰Brooks v. Yarborough (C. C. A. 10th, 1930) 37 F. (2d) 527; Notten v. Mensing (1935) 3 Cal. (2d) 469, 45 P. (2d) 198; Moreen v. Carlson's Estate (1937) 365 Ill. 482, 6 N. E. (2d) 871; Taylor v. Langenbacker (1941) 130 N. J. Eq. 59, 21 A. (2d) 219.

¹¹Ezill v. Mobley (1925) 160 Ga. 872, 129 S. E. 532; Kramer v. Cooper (1932) 347 Ill. 293, 179 N. E. 862.

¹²Estate of Nickson (1921) 187 Cal. 603, 203 Pac. 106.

¹³This note is not concerned with the problem of instructing the jury where the requirement of clear and convincing proof is met, but is confined to the question of the function of the appellate court in reviewing the evidence to determine whether there was sufficient proof to send the issue to the jury, or if no jury, whether the decision of the trial court is supported by clear and convincing proof. For a discussion of the problem of framing instructions where clear and convincing proof is required, see Morgan *Presumptions and Burden of Proof* (1933) 47 HARV. L. REV. 59, 66.

¹⁴See (1923) 23 A. L. R. 1520.

¹⁵Estate of Baldwin (1912) 162 Cal. 471, 123 Pac. 267; Estate of Sharon (1918) 179 Cal. 447, 177 Pac. 283; 9 WIGMORE, *op. cit. supra* note 3, § 2494.

ment must show that the facts which he asserts are more than merely probably true; that the probabilities are great that they are true. The appellate court should follow the rule employed in the ordinary civil suit. The problems are essentially the same. There is no more reason for leaving the solution of one to the trial court exclusively than there is for the other.

Where the burden upon the proponent is to prove by "clear and convincing proof" that certain facts are true, many appellate courts in the United States state that whether the proponent has sustained the burden is a question for the trial judge and that his ruling will not be disturbed upon appeal if there is substantial evidence to support it.¹⁶

The California Supreme Court recently faced this question of the function of trial and appellate courts in determining the sufficiency of the evidence upon which to base a judgment where the required measure of persuasion was "clear, satisfactory and convincing evidence." In *Stromerson v. Averill*,¹⁷ an action to quiet plaintiff's title to land, defendant, in his answer, offered evidence tending to prove that plaintiff was acting as defendant's agent in the purchase of the land in question. The case was tried without a jury and the trial court found that the plaintiff was acting as the defendant's agent when he purchased the land in his own name, and rendered judgment in favor of the defendant. Plaintiff sought a reversal of the judgment on the ground that the evidence establishing the agency and constructive trust in defendant's favor did not meet the requirement of clear and convincing proof. The supreme court rejected this argument, saying:

"The sufficiency of evidence to establish a given fact, where the law requires proof of the fact to be clear and convincing, is primarily a question for the trial court to determine, and if there is substantial evidence to support its conclusion, the determination is not open to review on appeal."¹⁸

It is submitted that the standard here announced is the same as the test for the ordinary civil case—the preponderance of the evidence—but that it is useless to talk in terms of clear and convincing proof

¹⁶*Chinn v. Llangollen Stable*; *Couts v. Winston*, both *supra* note 5; *Steiner v. Amsel* (1941) 18 Cal. (2d) 48, 112 P. (2d) 635; *Davis v. Pursel* (1913) 55 Colo. 287, 134 Pac. 107; *Walker v. Jackson* (1929) 48 Idaho 18, 279 Pac. 293.

¹⁷(1943) 22 A. C. 864, 141 P. (2d) 732.

¹⁸*Ibid.* at p. 871. Justice Traynor registered a dissent, stating that the evidence before the trial court was not sufficient to justify a finding that a constructive trust should be declared in defendant's favor. He declared that the evidence offered to prove the constructive trust was not clear and convincing and that the appellate courts should effectively enforce the requirement of a higher degree of proof.

and at the same time say that the question is whether there is *substantial* evidence to support the conclusion reached. Although many trial courts will follow the rule requiring clear and convincing proof, some may ignore the rule. Others may err in defining the degree of proof required and in weighing the evidence. The rule is not rendered entirely valueless, but its effect is greatly diminished under the holding of the *Stromerson* case. Since the requirement of a greater degree of proof is based upon sound public policy, it should be enforced effectively by appellate courts.

Although the Supreme Court of California followed what may be the majority view in the United States, several highly respected courts have come to the opposite conclusion and have exerted control over the trial courts in their jurisdictions, by reversing the trial courts where it appeared to them that the requisite degree of proof was lacking.

Thus, the Supreme Court of Colorado, in *Hawkins v. Elston*,¹⁹ in considering the evidence introduced to prove that a deed absolute on its face was a mortgage, stated:

"If upon consideration of all the evidence in the record, the reviewing tribunal can say, within its judicial discretion, that the specific character and quality of evidence essential to transform a deed, absolute on its face, into a mortgage, is lacking, the presumption in favor of the correctness of the decree of the trial court is overthrown, and the presumption that the deed and writings express the true contract between the parties is restored."²⁰

In *Nicolls v. McDonald*,²¹ the Supreme Court of Pennsylvania reversed the judgment of the trial court, stating:

"When a party sets up title against a deed absolute in its terms and seeks to convert it into a mortgage the proof of the alleged agreement necessary to change its character must be clear, explicit and unequivocal. . . . It is not sufficient that the jury may be convinced on the evidence given; but the question is, ought they to have been convinced?"²²

The Supreme Court of New Mexico, in *White v. Mayo*,²³ also reversed the trial court and stated:

"Parol evidence to establish an implied trust should be clear and unequivocal and such as goes distinctly to prove the facts necessary to create a trust. . . . Appellees' evidence fails to meet these

¹⁹*Supra* note 5, 146 Pac. 254.

²⁰*Ibid.* at 416, 146 Pac. at 260.

²¹*Supra* note 5.

²²*Ibid.* at 519.

²³*Supra* note 6, 299 Pac. 1068.

requirements . . . the judgment of the trial court is reversed and the same remanded with instructions to dismiss the complaint and it is so ordered."²⁴

In *Page v. Page*,²⁵ the Supreme Court of Virginia, reversing the judgment of the trial court which established a constructive trust, queried:

"Has the appellee established the fact that he intended and directed the conveyance in question to be made to himself alone, by evidence which is 'unequivocal and explicit' and 'by clear and convincing testimony?' The question must be answered in the negative."²⁶

The court then considered the evidence in detail and said:

" . . . the appellee has failed to sustain the case alleged in his bill by that degree of proof which is required in such cases. . . ."²⁷

In Utah, the supreme court in *Smyth v. Reed*²⁸ reversed the trial court, and decided that the evidence was insufficient to show that a deed, absolute on its face, was a mortgage. It stated, " . . . the evidence adduced in the case is not sufficient to limit the effect of the terms of these written instruments."²⁹

In several jurisdictions, the appellate courts have affirmed the judgments of the trial courts, but in so doing, they have *carefully* considered the evidence, and have come to the conclusion that it met the requirement of a higher degree of proof than that required in the ordinary civil action.³⁰

It is unfortunate that the Supreme Court of California has not seen fit to follow the rule of these courts and enforce the requirement of clear and convincing proof. Only by effective enforcement can the public policy that lies behind the requirement be carried out.

Bryant M. Bennett.

²⁴*Ibid.* at 440, 299 Pac. at 1072.

²⁵*Supra* note 6, 110 S. E. 370.

²⁶*Ibid.* at 70, 110 S. E. at 372.

²⁷*Ibid.* at 81, 110 S. E. at 376.

²⁸*Supra* note 5, 78 Pac. 478.

²⁹*Ibid.* at 268, 78 Pac. at 479. *Accord:* *Cape v. Leach* (1940) 283 Ky. 662, 142 S. W. (2d) 971; *Sloan v. Becker* (1894) 31 Minn. 414; *Johnson v. Nat'l Bank of Commerce* (1911) 65 Wash. 261, 118 Pac. 21 (supreme court reversed trial court; said evidence insufficient).

³⁰*Hall v. Hall* (1921) 149 Ark. 669, 234 S. W. 173; *Walker v. Walker* (1938) 369 Ill. 627, 17 N. E. (2d) 567; *Klusmire v. Dixon* (1939) 150 Kan. 871, 96 P. (2d) 634; *Purvis v. Hardin* (1938) 343 Mo. 652, 122 S. W. (2d) 936; *Walker v. Walker* (1916) 254 Pa. 220, 98 Atl. 890.