

## PART III

### *Production and Effect of Evidence*

## Chapter IX

### OF THE BURDEN OF PROOF

**117. Burden of proof.**--(1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

#### *Illustrations*

(a) A desires a Court to give judgment that B shall be punished for a crime which A says B has committed.

A must prove that B has committed the crime.

(b) A desires a Court to give judgment that he is entitled to certain land in the possession of B by reason of facts which he asserts, and which B denies to be true.

A must prove the existence of those facts.

### COMMENTS

**Scope.**--The burden of proof lies on the party who substantially asserts the affirmative of the issue and not upon the party who denies it. This rule of convenience has been adopted in practice, not because it is impossible to prove a negative, but because the negative does not admit of the direct and simple proof of which the affirmative is capable. Moreover, it is but reasonable and just that the suitor who relies upon the existence of a fact, should be called upon to prove his own case. In the application of this rule, regard must be had to the substance and effect of the issue, and not to its grammatical form, for in many cases the party, by making a slight alteration in the drawing of his pleadings, may give the issue a negative or affirmative form, at his pleasure.<sup>1</sup>

The party on whom the onus of proof lies must, in order to succeed, establish a *prima facie* case. He cannot, on failure to do so, take advantage of the weakness of his adversary's case. He must succeed by the strength of his own right and the clearness of his own proof. He cannot be heard to say that it was too difficult or virtually impossible to prove the matter in question. For example, a mere suspicion is not a proof of Benami.<sup>2</sup>

1. Taylor, 12th Edn. S. 364, p. 352.

2. AIR 1988 SC 637; AIR 1985 Pat. 110.

Appreciation of evidence. Suspicion. Suspicion, howsoever, strong it may be, by itself cannot take the place of proof.<sup>1</sup>

**Where proof of good faith requisite.**--Where the executant of the sale-deed was an illiterate and rustic 'pardanashin' lady, burden was upon the person, who transacted with her, to prove that the terms were fair and equitable; that she had independent advice in the matter, and that the document was explained to and understood by her.<sup>2</sup> Where executant of the sale-deed was an old, illiterate and blind woman and no consideration passed at the time of sale, onus lay on the purchaser to prove that the sale-deed was not executed under undue influence,<sup>3</sup> though in the execution of a gift deed by a 'pardanashin' lady, fraud was not established, still onus was on the defendant to establish the fact that the document was read over and explained to her.<sup>4</sup>

**Burden of proof--Oral and documentary evidence.** For establishing the fact alleged in the case or for proving the same, the party which was contending or alleging the same must prove his contention through some oral or documentary evidence and should not try to get benefit of weakness of the opposite party if there was any such weakness.<sup>5</sup>

**Burden of proof--Word against word.**--Effect. Defendant had denied plaintiff's version. Burden was on plaintiff to furnish cogent and trustworthy evidence to prove his plea. Plaintiff could not produce any other oral or documentary evidence except his word recorded in examination in chief. Plaintiff, held, could not be said to have produced such evidence as to establish his plea beyond doubt.<sup>6</sup>

**Burden of proof.**--Plaintiff must stand on his own legs and could not take benefit of weakness of adversary's case.<sup>7</sup>

**118. On whom burden of proof lies.**--The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

#### Illustrations

(a) A sues B for land of which B is in possession, and which, as A asserts, was left to A by the will of C B's father.

If no evidence were given on either side, B would be entitled to retain this possession.

Therefore, the burden of proof is on A.

(b) A sues B for money due on a bond.

1. 1996 PCr. LJ 478.
2. AIR 1995 Ori. 273.
3. AIR 1993 SC 956.
4. AIR 1994 Ori. 113.
5. 2003 PLC 279 (a).
6. PLD 2003 Kar. 45 (d).
7. 2003 YLR 683 (d).

satisfactory to discard testimony of plaintiff. Plaintiff on preponderance of evidence, however, failed to discharge initial burden by any reliable and satisfactory evidence. Property in question, was thus, neither purchased by plaintiff from his own funds nor defendant was proved to be Benami owner thereof. Defendant had in fact sufficient means and sources of income to purchase property in question.<sup>1</sup>

**Fact of deposit of amount--Onus to proof.**--Onus to prove the alleged payment lay heavily on the borrower as he had relied on the receipt and it was incumbent upon the borrower to prove the receipt. Borrower could not rely upon the statement made by the counsel of the Bank. Borrower had failed to discharge the onus of proof placed on him. Bank had referred to various documents on record including an application by the borrower showing the borrower's admission that the decree had not been satisfied and also his intent to make payment of the decretal debt if time was allowed to him. Banking Court had rightly passed the order against the borrower in circumstances.<sup>2</sup>

**Sale of land. Entry in the Revenue Record. Burden of proof.**--Neither original mutations nor Roznamchas were produced, even vendee who was well and alive had not been produce din the witness box. In absence of any ingredient of a valid sale, lower Appellate Court wrongly concluded that land in question was validly alienated through the said mutations.<sup>3</sup>

**Fraudulently and through misrepresentation.**--Burden to prove. Burden to prove that power of attorney had been executed fraudulently and through misrepresentation was upon the person claiming the same to be so. Nothing had been brought on record to infer that the power of attorney was executed fraudulently, rather perusal of the same would show that it was duly registered with the Registrar. Held, sanctity had to be given to the registered documents, stronger evidence was required to cast as persion on its genuineness. Where no such evidence was brought on record to conclude that the same was registered fraudulently, document was rightly accepted.<sup>4</sup>

**119. Burden of proof as to particular fact.**--The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

#### Illustrations

(a) A prosecutes B for theft, and wishes the Court to believe that B admitted the theft, to C. A must prove the admission.

(b) B wishes the Court to believe that, at the time in question, he was elsewhere. He must prove it.

1. 1991 SCMR 703; PLD 1960 Kar. 852 and PLD 1970 Dacca 414 *rel.* AIR 1925 PC 181; AIR 1926 Nag. 262; 1991 SCMR 703 and PLD 1995 SC 457 *ref.* 1997 MLD 390.

2. 2003 CLD 128.

3. 2006 MLD 279 (a).

4. 2003 YLR 1296 (b).

Although a revision would lie on ground of wrong allocation of burden of proof yet material irregularity must first be established before it can be said that it has affected the decision of the case.<sup>1</sup>

**120. Burden of proving fact to be proved to make evidence admissible.**--The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.

#### Illustrations

- (a) A wishes to prove a dying declaration by B. A must prove B's death.
- (b) A wishes to prove, by secondary evidence, the contents of a lost document. A must prove that the document has been lost.

#### COMMENTS

**Principle.**--Whenever it is necessary to prove any fact, in order to render evidence of any other fact admissible, the burden of proving that fact is on the person who wants to give such evidence. The illustrations explain the meaning of the Article.

This Article should be read with clause 2 of Article 131 and with the illustrations attached to that Article.

Failure to cross-examine any fact deposed in examination-in-chief. Effect. Such statement of a witness was deemed to be accepted.<sup>2</sup>

**Criminal trial--Onus to prove. Duty of prosecution. Scope.**--Prosecution must prove its case beyond reasonable doubt, except in a case of special plea taken by an accused in his defence. Burden is not shifted to accused to rebut the accusation.<sup>3</sup>

**Freedom of press. Principles. Defamatory publication. Onus to prove.**--Mere words of journalist are not sufficient to establish that allegations are correct and published after investigation, in the interest of public. In spite of freedom of press guaranteed in Art. 19 of the Constitution, press is not free to publish a material without proper verification. While publishing any news item, it is not necessary for press to violate principles of decency and established norms of morality.<sup>4</sup>

**Failure to produce original document.**--Application to lead secondary evidence. Trial Court after taking all the facts into account concluded that the original document was intentionally and *mala fide* being withheld and that the petitioner had failed to prove the loss of said document, therefore, his request to lead secondary evidence was turned down. Findings of Trial Court were supported by record. Trial

1. PLD 1963 Lah. 455.

2. 2001 MLD 957.

3. 2006 SCMR 1846 (i).

4. 2006 MLD 1462 (a).

**Onus to prove.**--Plaintiff has to prove his own case and to succeed on the basis of his own documents and not on the weaknesses in defendant's case.<sup>1</sup>

**Plaint, proof of. Principles.**--Plaintiff had to prove her case on the basis of her own evidence and could not get benefit of weaknesses of evidence of defendants.<sup>2</sup>

**Onus to prove.--Failure to discharge.** Effect. Where onus was placed on plaintiffs which they had not been able to discharge satisfactorily, the consequence would be that their suit must fail.<sup>3</sup>

**Agreement to sell. Onus to prove.**--Plaintiffs had filed suit for specific performance on the basis of agreement to sell, therefore, onus heavily lay upon them to prove the agreement. Proof of such agreement would be *sine qua non* for decreeing the suit.<sup>4</sup>

**121. Burden of proving that case of accused comes within exception.**--When a person is accused of any offence the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Pakistan Penal Code Act (XLV of 1860), or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances.

#### Illustrations

(a) A accused of murder, alleges that by reasons of unsoundness of mind, he did not know the nature of the act.

The burden of proof is on A.

(b) A, accused of murder, alleges that, by grave and sudden provocation, he was deprived of the power of self-control.

The burden of proof is on A.

(c) Section 325 of the Pakistan Penal Code Act (XLV of 1860), provides that whoever, except in the case provided for by Section 335, voluntarily causes grievous hurt, shall be subject to the certain punishments.

A is charged with voluntarily causing grievous hurt under Section 325.

The burden of proving the circumstances bringing the case under Section 335 lies on A.

#### COMMENTS

**Object.**--This Article is to relieve prosecution from necessity of proving absence of facts which might bring case within the general or special exceptions. Burden of proof cast on the accused cannot be as heavy as that cast on prosecution. Plea of the accused, although not established, may create a reasonable doubt with regard to his guilt. Court,

1. 2005 MLD 878 (b).
2. 2005 MLD 646 (e).
3. PLD 2003 Pesh. 49 (c).
4. 2006 SCMR 340 (a).

Section 342, Cr.P.C. held can and should be taken into consideration for examining the worth of the defence plea. And if the material on record it can be established that the defence version is reasonably possible then the accused be given due benefit on the basis of the rule laid down in *Safdar Ali's case*.<sup>1</sup>

**'Special exceptions'**--The special exceptions are those which are restricted to a particular crime.

**Interpretation of Section 8, Suppression of Terrorist Activities (Special Courts) Act, 1975.**--Burden of proving innocence by the accused is consequential to and dependent on the prosecution having first established the prerequisite contained in the first part of Section 8 of the Act. Such a situation, thus, could not be said to be violative of any provision of law as Article 121, Qanun-e-Shahadat also envisaged situation of similar nature. Provisions of Section 8, Suppression of Terrorist Activities (Special Courts) Act, 1975 were in no manner derogatory to the ordinary dispensation of criminal justice or for that matter violative of Article 12, Constitution of Pakistan, 1973, so as to be struck down.<sup>2</sup>

**122. Burden of proving fact especially within knowledge.**--When any fact is especially within the knowledge of any person the burden of proving that fact is upon him.

#### Illustrations

(a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

(b) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him.

#### COMMENTS

**Principle.**--The true purpose of this Article is very clearly discernible from the two illustrations which follow this Article. The first illustration is that when a person does an act with some intention other than that which the character and circumstances of the act suggest the burden of proving that intention is upon him. There has to be an allegation of fact. That allegation which would entitle the party to succeed would have ordinarily to be proved by him. But if having regard to the nature of the allegation and such *prima facie* evidence which might be furnished or which might be apparent it is pleaded by the other side that the thing did not happen in that way as it appeared the onus would then lie upon that party to prove the facts within his special knowledge in support of his plea.<sup>3</sup>

Where the knowledge of the subject-matter of an allegation is peculiarly within the province of one party to a suit, the burden of proof must lie there also. Thus, for

1. PLD 1981 SC 127.

2. PLD 1992 Lah. 517.

3. PLD 1966 Lah. 798.

Arts. 123-124]

husband in evidence gave quite different version by stating that he had purchased such property. Non-production of gift deed at the trial or before the Appellate Court and availability of the same document at a belated stage of revision was sufficient to show lack of *bona fide* of the defendant against the plaintiff, who was still recorded in Revenue papers as exclusive owner of suit land. The defendant, herself although claiming to be donee did not appear in Court as her own witness. The defendant, thus in spite of having full opportunity at trial to produce evidence with regard to the plea, had failed to bring on record any cogent evidence in support of the plea of gift.<sup>1</sup>

**123. Burden of proving death of person known to have been alive within thirty years.**--Subject to Article 124, when the question is whether a man is alive or dead and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it.

**124. Burden of proving that person is alive who has not been heard of for seven years.**--When the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it.

#### COMMENTS

**Scope.**--Articles 123 and 124 must be read together because the latter is only a proviso to the rule contained in the former, and both constitute one rule when so read together.<sup>2</sup>

There is no presumption in law that a person was alive for seven years from the time when he was last heard of. These Articles deal with the procedure to be followed when a question is raised before a Court, as to whether a person is alive or dead, but do not lay down any presumption as to how long a man was alive or at what time he died. Assuming that the Court could make a presumption that a person was alive for seven years after he was last heard of, it depends on the circumstances of each case, whether, the Court could draw such a presumption or not.<sup>3</sup>

Person not heard of for seven years. Affirmation to the effect that the person was alive Onus to prove. Where a person was not been heard of for seven years by those who would naturally have heard of him if he had been alive the burden of proving that he is alive is on the person who affirms the same.<sup>4</sup>

**Person not heard of for seven years.** Presumption of death of such person. Where a person had been unheard of since 1947, the provisions of Art. 124 of the Qanun-

1. 1989 CLC 1342.
2. AIR 1956 Pan. 1232.
3. (1912) 37 Mad. 440.
4. 2001 SCMR 1036.