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PROOF OF CRIME IN A CIVIL PROCEEDING*

By Littleton Groom†

In many civil cases proof of a criminal act must be made either to establish the plaintiff's case or as a defense thereto. Since the courts have established different rules as to proof in civil and criminal cases, the issue thus presents itself as to the amount of proof required to establish the commission of the criminal act involved in the civil case. Must its commission be established beyond a reasonable doubt, or is it sufficient to establish it by a preponderance of the evidence only? To state the matter somewhat differently, what is the duty of the trial court in instructing the jury as to the sufficiency of the evidence in such a case? It is the purpose of this survey to show how the courts have answered the question, to examine the reason or reasons behind their answers, and to set forth the law as it is today in the various jurisdictions.

DISTINCTION BETWEEN CIVIL AND CRIMINAL CASES

Prior to the last decade of the 18th century, there was no distinction between a civil action and a criminal prosecution as to the amount of evidence necessary to persuade a jury. However, it had been the practice of judges from the time of Coke to caution juries to be more certain in arriving at verdicts where life was at stake, as against verdicts where property only was involved. Without entering into a discussion of the reasons for, or the merits of, the distinction, or into the detail of its development since its establishment, it suffices to say that all Anglo-American courts, with the possible exception of Georgia, recognize it as the duty of the trial court to instruct the jury that proof in criminal cases must be beyond a reasonable doubt.

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2May, Some Rules of Evidence, 10 Am. L. Rev. 642, 651-664; Trickett, Preponderance of Evidence and Reasonable Doubt, 10 Dickinson L. Rev. 75.
REASONS FOR APPLYING "REASONABLE DOUBT" RULE TO CIVIL CASES

With this distinction established, it is easy to see how lawyers, in their zeal to win their cases, dragged the "reasonable doubt" doctrine into civil proceedings in which crimes were in issue. The trial judge was asked to charge the jury that the commission of the crime must be proved beyond a reasonable doubt. He gave the charge, or he refused to give it. In either event error was claimed and the case went up on appeal. It is apparent that the upper court could go either way. And that is exactly what the upper courts did. Some held proof beyond a reasonable doubt was necessary, while others held a preponderance was sufficient.

What influenced the courts? More specifically, what influenced those courts which required proof beyond a reasonable doubt? In England the answer seems to be that the courts were influenced by a rule peculiar to English procedure. In America the answer is twofold. One, the courts blindly followed English precedent; and two, when carrying the "two witness" rule, applied in proving perjury in a prosecution for that offense, over into a civil action in libel or slander based on perjury, they failed to distinguish between this "two witness" rule, under which two witnesses or one witness and corroborating circumstances were required to sustain a conviction for the crime of perjury, and the "reasonable doubt" rule, and carried the latter over into these civil actions also.

In England, from early times, under certain circumstances, it was possible to try an accused for a crime without an indictment or presentment. One of these circumstances obtained when a civil...
action in which a crime was in issue resulted adversely to the one against whom the crime was charged. He could immediately be tried without the intervention of a grand jury. This possibility of prosecution without an indictment or presentment has been ascribed by the American courts as the reason why the English courts required proof beyond a reasonable doubt in civil cases involving crimes. It is not clear why such a possibility should have operated to require more than a preponderance of evidence in the civil cause. If, under the preponderance rule, there were


9 Such first actions, in which the procedure was applied, were actions of trespass, from which it was extended to actions on the case.

10 If in a civil action de uxore rapta cum boni viri upon not guilty pleaded, the defendant be convicted, this antiently served in nature of an indictment of felony (13 Assiz 6. 18 E. III. 32.a. Stamf. P.C.F 94.b). So if upon a special verdict in trespass brought in the kings bench, it be found, that the defendant took them feloniously, antiently this served for an indictment.

"So if in an action of slander for calling a man a thief the defendant justifies that he stole the goods, and issue thereon taken, it be found for the defendant, if this be in the king's bench, and for a felony in the same county where the court sits, or if it be before justices or assize, who have also a commission of jail-delivery, he shall be forthwith arraigned upon this verdict, as an indictment, and the reason is, because here is a verdict of twelve men in these cases, and so the verdict, tho in a civil action, serves the king's suit as an indictment, and is not contrary to the act of 25, 28 and 42 E. III, which enacts that no man shall be put to answer, etc., but upon an indictment or presentment." 2 Hale, P C., 151. There is a similar statement in 2 Hawkins, P C., 8th ed., 291. See Johnson v. Browning, (1705) 6 Mod. 216; Prosser v. Rowe, (1826) 2 C. & P 421.

12 Lord Kenyon, in Cook v. Field (1788) 3 Esp. 133, "Where a defendant justifies words which amount to a charge of felony, and proves his justification, the plaintiff may be put upon his trial by that verdict, without the intervention of a grand jury." He cites no authority, but clearly has in mind the rule as stated by Hale, Hawkins, et als. Although made in reference to a slander action, this statement of Kenyon's has been much quoted in the cases, both in actions in slander or libel and in actions other than slander or libel.

evidence on the issue of crime sufficient to turn the case against the one charged with the crime, it is quite likely that this same evidence, or even a lesser amount, if presented to the grand jury, would have been sufficient to result in the returning of a true bill. It has never been required that the grand jury be persuaded beyond a reasonable doubt before returning an indictment. The jury in the civil action has in effect performed the function of the grand jury. Nor is it clear how this possibility of a prosecution after a verdict in a civil case operated to violate the accused’s statutory right, not to be tried without an indictment, in any save a technical sense. At common law, the purposes of an indictment were. (1) to give notice to the accused in order that he might prepare his defense, (2) to enable the accused to plead as a defense his former conviction, or acquittal, in case he were again prosecuted for the same offense, (3) to give the court an opportunity to decide the issues of pleading without hearing evidence, and the accused an opportunity to elect as to how he should present his defense—whether by motion to quash, by demurrer, or by plea. Except for the technical elements in (2) and (3), no prejudice to the accused’s rights are apparent in the English procedure. Upon trial of the accused, either with or without an indictment, the ameliorating influence of the “reasonable doubt” rule would assert itself. The lack of grand jury action would in no wise affect the measure of proof required on the trial. As a reason for requiring proof beyond a reasonable doubt in the English cases, or in any other, it seems unsubstantial. Probably all that can be said in support of the reasoning is that “penal consequences might in some sort be said to follow the verdict in a civil case.”

13In England the right was statutory and largely confined to felonies. 2 Hale, P. C. 151, Holdsworth, History of English Law, 3d ed., pp. 607-13. The grand jury was suspended during the World War; and there is great agitation to abolish it today. In America the older states guaranteed the right either in their constitutions or by court interpretation of constitutions. Many states still have such constitutional guarantees. For present state requirements as to indictments, see Keedy, The Drafting of a Code of Criminal Procedure, 15 Am. Bar Ass’n Jl. 7. For effect of 14th amendment on changes in criminal procedure, see Hurtado v. California, (1883) 110 U. S. 516, 4 Sup. Ct. 111, 28 L. Ed. 422. Cf. Ex parte Bain, (1886) 121 U. S. 1, 7 Sup. Ct. 781, 30 L. Ed. 849.


15Ellis v. Buzzell, (1872) 60 Me. 209, 213.
beyond a reasonable doubt on the issue of crime in civil cases in England, nevertheless, it would have no application in American jurisdictions, and its inapplicability has been pointed out by a number of courts.¹⁶ Not being applicable, those courts which followed English precedent did so blindly

Two 19th century English authorities on Evidence, Fitzjames Stephen and Pitt Taylor, are frequently cited as upholding the doctrine that criminal charges arising in civil proceedings must be proved beyond a reasonable doubt. Stephen, in the section on Presumption of Innocence, in his Digest,¹⁷ very succinctly states his conception of the law

“If the commission of a crime is directly in issue in any action, criminal or civil, it must be proved beyond a reasonable doubt. The burden of proving that any person has been guilty of a crime or wrongful act is on the person who asserts it, whether the commission of such act is or is not directly in issue in the action.”

His work, a digest, gives no reasons in support of the statements.¹⁸

Taylor, in his treatise, is more elaborate. Like Stephen’s, his advocacy of the doctrine is to be found in the section devoted to a discussion of the presumption of innocence. He supports his views thus:¹⁹

“The right which every man has to his character, the value of that character to himself and his family, and the evil consequences that would result to society if charges of guilt were lightly entertained, or readily established in courts of justice — these are the real considerations which have led to the adoption of the rule that all imputations of crime must be strictly proved. The rule, then, is recognized alike by all tribunals, whether civil or criminal, and is equally effective in all proceedings, whether the question of guilt be directly or incidentally raised.”

Although this was said in reference to “presumption of innocence,” which constitutes the first part of the “reasonable doubt” rule, it seems clear that the learned author had in mind “measure of persuasion,” which constitutes the second part of the rule.²⁰ It is well known that the “measure of persuasion” part of the rule was introduced into the law for the purpose of ameliorating

¹⁶Cases cited supra note 12.
¹⁷Stephen, Digest of the Law of Evidence, art. 94.
¹⁸See comment of Thayer on Stephen’s art. 94 in his Preliminary Treatise pp. 557-558.
²⁰See note 4, supra.
the rigors of the criminal code, in the days when death was the punishment for nearly all crimes. It was introduced in favor of life. That it resulted in protecting character to a certain degree in criminal cases was merely incidental. Had the protection of character been one of its purposes, and had the fulfillment of that purpose required that the rule be applied in civil proceedings involving charges or imputations of crime, as Mr. Taylor would have us believe, then, surely the rule would have been extended to most, if not all, civil actions, for the outcome of nearly every civil action can be shown to impinge upon the good character of one or both litigants. What could be more damaging to reputation than the proof of a charge of unchastity, illegitimacy, criminal conversation, contagious disease, insolvency, use of intoxicating liquors to excess, exercise of undue influence, and the like? Yet, in breach of promise cases in which chastity becomes an issue, proof beyond a reasonable doubt has never been required. The same is true of actions for criminal conversation, slander or libel proceedings charging disease, venereal or other kind, voluntary or involuntary bankruptcy proceedings, or other proceedings affecting credit. Even in civil actions in which the question of legitimacy may have been raised—actions in which it would seem that the "reasonable doubt" rule ought to have been applied, if it should have been applied in any civil case—, the English courts in 1848, when Taylor published the first edition of his treatise, did not require proof beyond a reasonable doubt to rebut the presumption of legitimacy or to prove illegitimacy.20a

The courts are against Mr. Taylor. They are almost unanimous in their refusal to apply the "reasonable doubt" rule to civil cases. This unanimity does not mean that his idea is without merit.21 It means only that its merit is not of sufficient weight for this particular purpose—the extension of the "reasonable doubt" rule to civil cases. It may be that the explanation for this rejection by the courts of Taylor's argument is to be found in a conflict of policies, a conflict between the policy favoring the protection of reputation and the policy favoring the restriction of the "reasonable doubt" rule to criminal cases. Since the introduction of the rule into the law, conditions have changed. The criminal code has been reformed. The death penalty is inflicted


21 As a reason for allowing the admission of character evidence in certain civil cases, Judge Taylor's argument has considerable merit. See 1 Wigmore, Evidence, 2d ed., sec. 64 for a discussion of this.
for major crimes only, and in some jurisdictions has been abol-
ished. The "reasonable doubt" rule is criticized as being mean-
ingless, obstructive and obsolescent. The considerations in favor
of its restriction outweigh those favoring its extension, even when
presented under the guise of protecting character.

The Beginning of the Doctrine in England

The first English case involving the application of the
"reasonable doubt" rule in a civil cause, was that of Thurtell v. Beaumont, decided November 10, 1823 by the Court of Common
Pleas. There, in an action on a fire insurance policy, the defense
being arson, the trial judge, Park, J., instructed the jury "that
before they gave a verdict against the plaintiff, it was their duty
to be satisfied that the crime of wilfully setting fire to the
premises was as clearly brought home to him in this action, as
would warrant their finding him guilty of the offense, if he had
been tried before them on a criminal charge." It was held that
the direction was correct. The next case, Chalmers v. Shackell, decided at Nisi Prius in 1834, was an action in libel for charging
forgery Without citing the Thurtell Case, the court reached a
similar conclusion, and used language substantially the same as
that used by Park, J. The third presentation of the question was
also in a Nisi Prius case, Wilmott v Harmer, decided in 1839.
The action was slander for charging bigamy The holding was
the same as in the two prior cases, neither of which was cited as
authority There is a note to this Wilmott Case which refers to
the procedure of trial without an indictment on a criminal charge
following a verdict in a civil case. It has been seen that the
extension of the "reasonable doubt" rule in England has been
ascribed to this procedural rule. The writer believes that this
note (possibly the note of the reporter) is the basis for such an
ascription. This belief is strengthened by the fact that the note
has been cited along with the three cases just mentioned.

22 May, Some Rules of Evidence, 10 Am. L. Rev. 642; Trickett,
Preponderance of Evidence and Reasonable Doubt, 10 Dickinson L.
Rev. 75.
23 (1823) 1 Bing. 339. See comment on the case, May, Some Rules
of Evidence 10 Am. L. Rev. 642, 644; Magee v. Mark, (1861) 11 Ir.
24 (1834) 6 C. & P 475.
25 (1839) 8 C. & P 695.
26 (1839) 8 C. & P 695 note (a).
27 Supra page 2.
28 Cases cited supra note 12.
In America, the question was considered for the first time in North Carolina, in the case of *Kincade v. Bradshaw*; decided in June, 1824, some seven months after the first English decision. The action was one of case for slander. The defendant, who was being sued for having charged the plaintiff with perjury, pleaded the truth in justification. The jury was instructed that the evidence should be such as would convict the plaintiff if he were on trial for the offense. Verdict was found for the plaintiff.

"On appeal the only point presented was, whether, to support the plea of justification, it was necessary to do more than to produce such evidence as would raise a probable presumption of the plaintiff's guilt, or should it be such as would be requisite to convict the plaintiff of perjury on an indictment."

The instruction was held erroneous and the cause reversed. The court was aware of the distinction between the "two witness" rule and the "reasonable doubt" rule. It was aware that neither rule could consistently be extended to civil actions. The language of Taylor, C. J., in speaking for the court is worth quoting.

"It cannot, therefore, be a correct rule, that a jury should require the same strength of evidence to find a fact controverted in a civil case, which they would require to find a man guilty of a crime. But the crime of perjury stands upon peculiar grounds, and requires more evidence to produce a conviction than crime in general. One witness is not sufficient, because then there would only be one oath against another. A man knowing another to have committed perjury, may forbear to prosecute him for the very reason that there is but one witness by whom the crime can be proved. Shall he, therefore, be deprived of his justification, if sued in an action of slander, although he might be furnished with convincing evidence of the truth of the words? Both reason and authority answer in the negative. In the case of *Queen v. Murat*, the principles I have stated are perspicuously enforced by the Chief Justice in his charge to the jury. His words are, "There is this difference between a prosecution for perjury and a bare contest about property, that in the latter case the matter stands indifferent, and, therefore, a credible and probable evidence shall turn the scale in favor of either party, but in the former, presumption is ever to be made in favor of innocence, and the oath of the party will have regard paid to it until disproved. But it must be a clear and strong evidence. and more
numerous than the evidence given for the defendant, else there is only oath against oath.' In this opinion is contained the very principle upon which the case before us depends, and it shows, beyond doubt, that there ought to be a new trial."

The court was not acquainted with the *Thurtell Case*. From the language of Taylor, C. J., it is a fair conclusion that the English decision would have exerted little influence. North Carolina has never departed from the decision in the *Kincade Case*. Today the rule there is that a preponderance of the evidence is sufficient in any civil action. North Carolina is one of the states which has not, at one time or another, toyed with the other view.

The development of the law in that state, as well as in each of the other states, so far as the writer has been able to discover, will be presented in an Appendix to the text. An exception to this form of presentation will be made in the case of two or three states in which the development has been particularly interesting, and which, for the purposes of comparison, will be included in the body of the text.

Two years after the North Carolina decision, the case of *Woodbeck v. Keller* was decided by the supreme court of New York. Since this case is most frequently cited as authority for the doctrine that a charge or imputation of crime in a civil cause must be proved beyond a reasonable doubt, it will bear careful examination.

The action was one of slander for accusing the plaintiff of perjury. The defense was truth. The trial judge charged the jury:

"That the two witnesses for the defendant, being contradicted by four witnesses on the part of the plaintiff, as to what she (the plaintiff) did swear, the former were not to be believed. Also, that it is settled law, that to sustain the justification the defendant must prove the perjury by two witnesses, or by one witness and circumstances tantamount to another witness."

Verdict was for the plaintiff. In denying the motion for a new trial, the supreme court, speaking through Sunderland, J., said in part:

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33Ruffin, for the appellee, admitted there were no authorities on the subject and urged a decision based on common sense. 1 Bingham was not complete until the end of Michaelmas Term (Jan. 31) 1824. It is doubtful whether this report had been printed and distributed in the states by the time of the North Carolina decision.

34(1826) 6 Cow. (N.Y.) 118.

35Practically every American court, supporting the doctrine, has cited the case.

36(1826) 6 Cow. (N.Y.) 118, 119.
"I understand the rule to be as laid down by the judge, that where, in an action of slander, a defendant justifies a charge of perjury, one witness is not sufficient to prove the truth of the charge, and sustain the justification. The evidence must be the same as required to convict a defendant on an indictment for perjury. There must be either two witnesses, or one witness, corroborated by material and independent circumstances. Upon an indictment the rule is well established and undisputed (citing authorities), and no ground of distinction is perceived between the two cases."

The sentence in italics is the basis of the contention that this case stands for the rule that a criminal issue in a civil action must be proved beyond a reasonable doubt. Taking the sentence alone, it might well be construed as supporting the contention. Again, it might equally well be construed as meaning that the same number of witnesses is required to prove perjury in a civil action as is required in a prosecution for perjury. Alone it is ambiguous. Read in connection with the sentences immediately preceding and following, the ambiguity is removed. That it has reference to the "two witness" rule is clear. The case decides that two witnesses, or one witness and corroborating circumstances, are required to prove a charge or imputation of perjury in a civil action of slander or libel, and it decides nothing more.

Woodbeck v. Keller was followed and the "two witness" rule applied in Clark v. Dibble and Hopkins v. Smith, both of which are New York supreme court decisions, and both, actions in slander based on charges of perjury. These cases have also been misunderstood and wrongly cited. The three cases have been reviewed and confined to their true limits by the New York court of appeals and by the New York supreme court, general term.

Another case very often cited as authority for the doctrine of "reasonable doubt" in a civil cause is that of Coulter v. Stuart, decided by the supreme court of Tennessee in July, 1828. In point of time, it was the third American decision. It, too, was an action for slander, based on a charge of perjury. The defendant pleaded truth. The trial judge was requested to charge the jury that

36a Italic the author's. [Ed.]
37(1837) 16 Wend. (N.Y.) 601.
38(1848) 3 Barb. (N.Y.) 599.
39 People v. Briggs, (1889) 114 N. Y. 55, 64, 20 N. E. 820, aff'g (1888) 47 Hun (N.Y.) 266 (Action to recover a penalty).
41(1828) 2 Yerg. (Tenn.) 225.
one witness was sufficient to sustain the plea of justification. The request was refused and the jury was charged in accordance with the "two witness" rule. Verdict was found for the plaintiff. Upon appeal the question of the correctness of the charge was all that was before the supreme court. In the course of its opinion, sustaining the charge, the court through Peck, J., said 42

"What is the issue to be tried? Not the speaking of the words, for the speaking is admitted by the plea, but the fact, has the party accused been guilty of perjury? To prove or fix the charge upon the plaintiff in a civil case should require the same quantum of proof 45a which would be required to convict him upon a criminal prosecution."

This is dictum, and is so recognized by the Tennessee Court. 43 The case decides only what was decided by the Woodbeck Case, and, like it, affords no firm support for the extension of the "reasonable doubt" rule to civil actions, even though they be in slander for perjury

In a note to this Tennessee case, the Woodbeck decision is cited. This is evidently the work of the reporter. No reference is made to the Kincade Case, decided in the mother state of North Carolina four years previously

These three earliest cases were all actions in slander based on a charge of perjury Curiously enough the first cases, raising the problem in a number of other states, were likewise actions in libel or slander based on charges of perjury 44 Where the courts established the "beyond reasonable doubt" principle in this form of action, it was a mere matter of analogy to extend it to actions in libel or slander charging or imputing crimes other than perjury, 45 and to actions other than libel or slander in which crimes were charged or imputed. 46

42(1828) 2 Yerg. (Tenn.) 225, 226.
43Italicics the author's. [Ed.]
47Shultz v. Pacific Insurance Co., (1872) 14 Fla. 73 (Trespass
Many of the courts, which embraced the doctrine, did so only for a time, repudiating it when convinced of error. Some have felt bound by stare decisis and maintain the doctrine in part, limiting it to narrow confines. Some have never accepted it. Of the first, Iowa is representative. Of the second, Illinois presents the most interesting example. Of the third, reference has been made to North Carolina. Michigan, however, furnishes a better illustration than North Carolina, because of the greater number of cases. These three states, Iowa, Illinois, Michigan, will be taken and the development in each will be traced as briefly as possible.

DEVELOPMENT IN IOWA

The history of the doctrine in Iowa begins with the case of Bradley v. Kennedy, another “slander-perjury” case, decided by the supreme court, sitting at Ottumwa, in June, 1849. Like most of the cases already discussed, this case decides that the “two witness” rule is to be applied in slander actions involving perjury. It was stretched to include the “reasonable doubt” rule and that rule applied in a slander-arson case in Forshee v. Abrams, the second Iowa decision bearing upon our problem. The doctrine was reaffirmed and persuasion beyond a reasonable doubt was required in Fountain v. West, an action in slander charging poisoning of cattle, in Ellis v. Lindley, an action in slander charging perjury; and in Barton v. Thompson, an action for burning building; Germania Fire Insurance Co., v. Klewer, (1889) 129 Ill. 599, 22 N. E. 489 (Insurance—Arson); Barton v. Thompson, (1877) 46 Iowa 30 (Damages for burning wheat—arson imputed); Thayer v. Boyle, (1849) 30 Me. 475 (Trespass for burning barn); Berckmans v. Berckmans, (1864) 17 N. J. Eq. 453 (Divorce—adultery); Lexington Fire Insurance Co. v. Paver, (1847) 16 Ohio 324 (Insurance—Arson), Murray v. Aiken Mining Co., (1891) 37 S. C. 468, 16 S. E. 143 (Breach of trust—Larceny).

47Florida, Indiana, Iowa, Maine, Missouri, Ohio, Pennsylvania, Tennessee, Wisconsin.
48Delaware, Illinois, New Jersey, South Carolina.
50Supra page 563.
51(1849) 2 Greene (Iowa) 231.
52(1856) 2 Iowa 571.
53(1867) 23 Iowa 9. Judge Dillon was doubtful of the rule but felt bound by prior decisions. Cf. his opinion there with his opinion in Scott v. Home Insurance Co., (C.C. Mo. 1870) 1 Dillon 105, Fed. Cas No. 12,533.
54(1874) 38 Iowa 461.
55(1877) 46 Iowa 30.
damages for loss of wheat by fire, the defendant being charged with arson. In each of these last three cases, pressure was brought to bear upon the court to overrule all the prior decisions requiring the strict measure of proof. In the last named case, a rehearing was had upon the question. The court, however, was not disposed to depart from the rule established by the cases.

Such was the state of the law until April, 1881, when *Welch v. Jugenheimer* marked a turning point. The action in that case was brought by a wife to recover damages for injuries caused by the sale of intoxicating liquors to her husband. A statute made it a crime to sell liquor to one already intoxicated. The defendant requested a "beyond reasonable doubt" instruction and it was refused. The jury was charged that proof by a preponderance of the evidence was sufficient. Upon appeal the question, so far as it related to civil actions other than slander, was reopened and the doctrine reviewed. The charge of the trial court was sustained, *Barton v. Thompson* was expressly overruled, and the doctrine was restricted to slander or libel actions. It is to be noted that the judge, Seevers, J., who rendered the opinion in this case, was the same judge who, four years before, had rendered the opinion upon the rehearing in the *Barton Case*. There, stare decisis, and an inability to distinguish between an action in slander and any other civil action charging crime, had influenced the court. Here, the greater weight of authority convinced the court that it had been wrong in the *Barton Case*.

The *Welch Case* was cited and followed in *Lewis v. Garrettson*, decided about six weeks after the *Welch Case*. The action was one of assumpsit on a note. The defense was forgery. The trial court's charge to the jury required proof beyond a reasonable doubt. The charge was held erroneous and the judgment was reversed. A bastardy proceeding raised the question for the third time in that year, (1881) Seevers, J., by citing the overruling of *Barton v. Thompson*, and the establishing of the new rule in the *Welch Case*, made short shrift of the defendant's contention that persuasion beyond a reasonable doubt was necessary.

But one more step, the repudiation of the rule in slander

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*Welch v. Jugenheimer* (1881) 56 Iowa 11, 8 N. W. 673.

*Barton v. Thompson* (1877) 46 Iowa 30.


PROOF OF CRIME IN A CIVIL PROCEEDING

actions, remained to be taken, and that step was taken in 188460 in Riley v. Norton.61 The defendant had accused the plaintiff of larceny. In an action for slander, the defendant pleaded justification. The jury was instructed that proof beyond a reasonable doubt was necessary to sustain the defendant’s plea. This was entirely in accord with the decisions of the highest state court. Upon appeal the judgment for the plaintiff was reversed, all the decisions to the contrary were expressly overruled;62 and the preponderance rule was adopted in slander actions involving crime. Judge Seevers again rendered the opinion for the court. Inability to distinguish between an action in slander, and any other civil action charging crime, now that a preponderance was all that was required in the latter,63 plus the weight of authority in other states, influenced the court. With this decision preponderance became the rule in all civil actions. It is so today with possible exceptions in divorce proceedings based on adultery64 and in the actions based on fraud.65 In these actions the court talks in terms of “clear and satisfactory,” “clear and convincing,” and the like. As will be shown later, the majority of the jurisdictions use the same expressions when dealing with fraud or divorce.

The history of the development in Iowa would not be complete without reference being made to Judge Dillon’s intimation, in Fountain v. West,66 that legislative action would be necessary in order to change the rule. This impression was not shared by the court. In none of Judge Seever’s opinions is reference made to Judge Dillon’s view. When the court became fully convinced that its former decisions were undesirable, it overruled them

60There were two cases, involving the measure of persuasion in civil actions, between 1881 and 1884: Behrens v. Germania Insurance Co., (1882) 58 Iowa 26, 11 N. W. 719 (Insurance—Arson); and Coit v. Churchill and Co., (1883) 61 Iowa 296, 16 N. W. 147 (Assumpsit—Forgery). Both followed Welch v. Jugenheimer, (1881) 56 Iowa 11, 8 N. W. 673.
61(1884) 65 Iowa 306, 21 N. W. 649.
62Bradley v. Kennedy, (1849) 2 Greene (Iowa) 231 (Only the two witness rule was involved in this case. Query whether the case was overruled?); Forshee v. Adams, (1856) 2 Iowa 571, Fountain v. West, (1867) 23 Iowa 9; Ellis v. Lindley, (1874) 38 Iowa 461.
63Judge Seever’s reasoning upon the impossibility of drawing the distinction for this purpose seems eminently sound. This is to be said, also, about his reasoning in the Barton case.
64Edmunds v. Ninemires, (1925) 200 Iowa 805, 204 N. W. 219.
and adopted the preponderance rule. This Iowa method of effecting the change is to be contrasted with the course which was pursued in two or three other states. In Indiana the court confined the "reasonable doubt" rule in civil cases to libel or slander actions. It felt itself powerless to change the rule in these actions with the result that the legislature abolished the "reasonable doubt" rule and established the "preponderance" rule in them. Legislative aid was also required in Illinois, and in Pennsylvania, with respect to libel or slander actions. Most of the states, which embraced the "reasonable doubt" doctrine, later repudiating it, followed the Iowa method, resort to the legislature not being deemed necessary.

DEVELOPMENT IN ILLINOIS

It is amazing the number of times the appellate courts in Illinois have found it necessary to pass upon the question of proof of a crime in a civil action. No other state has so many reported decisions involving this particular point.

The earliest decision was that of Crandall v. Dawson. Here again the action was one in slander for charging perjury. Here again the holding was that two witnesses, or one witness and corroborating circumstances, were required to prove the charge of perjury in a slander action. The correctness of the trial court's instruction to the jury upon the "two witness" rule was all that was before the court for decision. It was all that was argued by the counsel. The trial court had charged that two witnesses were required to prove the perjury, one witness and corroborating circumstances not being enough. Judgment for the plaintiff was reversed by reason of the error committed in instructing that one witness and corroborating circumstances would not suffice. In its discussion of the "two witness" rule, the court said:

"It, therefore, becomes necessary to a proper decision of this case to ascertain the number of witnesses, and the amount of

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67 Ind. Acts 1897, p. 137, sect. 376 e.
68 Ill. Rev. St. 1874 chap. 126, par. 3. Approved March 31, 1874. In force July 1, 1874.
70 For development in Indiana and Pennsylvania, see Appendix.
71 The question has been raised in one form or another in over fifty cases.
72 New York appellate courts have passed upon the question more than twenty-five times. Wisconsin, Michigan, Iowa, Indiana and Maine follow New York with fourteen or fifteen each.
73 (1844) 1 Gilman (Ill.) 556.
74 (1844) 1 Gilman (Ill.) 556, 558.
testimony required by the common law to establish the crime of perjury, for the same rule is applicable to the defense interposed in this case. The defendant must clearly make out his justification, or the defense cannot avail him. *He undertook, by the notice, to prove that the plaintiff had committed perjury, and he is to be held to the same strictness of proof as would be required in a prosecution for the same offense.*" (Citing *Woodbeck v. Keller*).

The court then goes further into the "two witness" rule.

The case has been cited by subsequent Illinois courts as authority for requiring proof beyond a reasonable doubt in a civil proceeding involving a crime. It is authority for no such doctrine. No statements to that effect are to be found in the court’s opinion. It is true that broad language is used. The italicized portion is an example. When the court voiced that language, it seems clear that it had in mind the "two witness" rule and nothing more. If so, the *Woodbeck Case* was properly cited. If the "reasonable doubt" rule was contemplated and the language was intended to refer to that rule, then it was dictum and the *Woodbeck Case* was misconstrued. In either event, the case will not support the doctrine for which it is cited.

Strikingly similar wording was used in the subsequent case of *Darling v. Banks,* another slander-perjury case. It, too, has been cited to support the application of the "reasonable doubt" rule in civil actions. The court was concerned with the question of whether a new trial should have been granted, a motion for one having been denied below. It defined perjury, discussed variance between proof and pleadings, analyzed the evidence, and reversed the judgment. In the course of its discussion of variance, a statement similar to the one in the *Crandall Case* was made. And on that statement, a mere dictum at most, must the case rest as an authority for proof beyond a reasonable doubt.

The first decision expressly holding that proof beyond a reasonable doubt was necessary in a civil cause, was that of *Crotty*
v. Morrissey,79 decided in 1866.80 The action was in slander for charging larceny Darling v. Banks81 was given as authority. The same court at the same term decided Harbison v. Shook,82 expressly holding that proof beyond a reasonable doubt was necessary to sustain a plea of justification in a slander-perjury action. No authorities were cited. The rule was reaffirmed in another slander action83 in 1872. By an act of the legislature of 1873-74 the rule in libel or slander cases was abrogated and the "preponderance" rule established.84

After the establishment of the "reasonable doubt" rule in slander actions, it was not long before the same rule was extended to other civil actions involving crime. This was first done by a negative process in the case of Sprague v. Dodge85 in 1868. The action was one of assumpsit to recover for the destruction of a mill by fire. Under the terms of the lease, by which the defendant held the mill, recovery for loss by fire could not have been had if the fire had been avoidable. The plaintiff averred that the fire had been caused by the misconduct and carelessness of the defendant. There was evidence tending to show that the defendant had set fire to the mill. His counsel requested an instruction on reasonable doubt. This was refused and the "preponderance" rule was applied. Upon appeal, the instruction was sustained. The rule was laid down that proof beyond a reasonable doubt would be required only in those civil cases where the crime was charged in the pleadings. The case did two things (1) extended the reasonable doubt rule to civil actions other than slander, and (2) limited it in all actions, by making its application dependent on the pleadings. As authority for the second of these,

79(1866) 40 Ill. 477
80There is a case, McConnell v. Delaware Insurance Co., (1856) 18 Ill. 228, which is cited as supporting the application of "reasonable doubt" rule in civil cases. Without its being necessary for the decision of the case, the court said persuasion beyond a reasonable doubt was required. It then found that there was that amount of evidence presented. The court might well have done what was done in a recent case, People v. Len Small, (1926) 319 Ill. 437, 481, 150 N. E. 435, 453, where it was held unnecessary to decide whether the "reasonable doubt" rule should have been applied, because, under any rule, the evidence showed, beyond all reasonable doubt, a liability in the defendant
81(1852) 14 Ill. 46.
82(1866) 41 Ill. 141.
83Corbley v. Wilson, (1872) 71 Ill. 210 (Slander—Crime abhorrent to nature).
84Ill. Rev. St. 1874, chap. 126, par. 3.
85(1868) 48 Ill. 142.
the limitation,\(^\text{86}\) Crandall v. Dawson,\(^\text{57}\) and Harbison v. Shook\(^\text{48}\) were cited. It has already been indicated that Crandall v. Dawson is authority for the application of the “two witness” rule in a slander-perjury case and for nothing more. Since the personnel\(^\text{89}\) of the court which decided Sprague v. Dodge in 1868 and Harbison v. Shook in 1866 was the same, all that need be said of the Harbison Case, as authority for the pleading limitation, is that the court in its opinion in Sprague v. Dodge made clear what was not clear in its earlier opinion. A Maine case,\(^\text{90}\) and a Massachusetts case,\(^\text{91}\) were also cited in support. The Massachusetts case is not in point. The Maine case is properly cited. It, however, relies upon this same Massachusetts case and upon a section in Greenleaf, neither of which is authority for the point. It is thought that the limitation is derived from the common law rule governing variance between the proof and pleadings.\(^\text{92}\)

"However, regardless of its origin, or the authorities supporting it, the qualification was not an undesirable one. It was but one, the first one, of four limitations of the "reasonable doubt" rule in civil cases. It has been applied consistently \(^\text{93}\) and is a part of the Illinois doctrine today—"

The second restriction has already been indicated—the legislative enactment relative to proof in libel or slander actions.\(^\text{94}\) The third limitation did not come until 1919,\(^\text{95}\) when the case of

\(^{86}\) This same limitation has been applied by a few other courts, Strader v. Mulvane, (1867) 17 Ohio St. 624; Jones v. Greaves, (1874) 26 Ohio St. 2; Sinclair v. Jackson, (1860) 47 Me. 102. There is an intimation of such a limitation in Burr v. Willson, (1875) 22 Minn. 206.

\(^{87}\) (1844) 1 Gilman (Ill.) 556.

\(^{88}\) (1866) 41 Ill. 141.


\(^{90}\) Sinclair v. Jackson, (1860) 47 Me. 102.


\(^{92}\) The application of variance rule is illustrated in Sanford v. Gaddis, (1851) 13 Ill. 329 (Slander—Perjury), which the court might well have cited as authority for the limitation.


\(^{94}\) Supra page 572 and note 84.

\(^{95}\) There was a forerunner to this limitation in a dictum in Grimes v: Hilliary, (1894) 150 Ill. 141, 146 36 N. E. 977, 979.
Foster v. Graf was decided. This case, and those following it, confined the "reasonable doubt" rule to civil cases, other than libel or slander, in which the crime charged was made in the pleadings against a party to the suit. Very few actions arise in which the charge is made against one not a party, consequently, this qualification is of no very great importance. It manifests, however, a dislike for the use of the "reasonable doubt" rule in civil actions and indicates a trend toward the majority view.

The fourth and latest modification is one which limits the application of the "reasonable doubt" rule in civil cases to crimes which are felonies. It, likewise, is a desirable step in the right direction. This step came in 1925 in Rost v. Noble. The action was founded upon the unlawful employment of an infant. A statute forbade the employment of a child under 16, and imposed as a penalty for its violation a fine of not less than $5.00, or more than $100.00. The trial court refused to charge that the plaintiff must prove the violation beyond a reasonable doubt. On appeal, the lower court's ruling was upheld, the highest state court declaring that the "reasonable doubt" rule in civil cases applied only to crimes amounting to felonies. This conclusion was reached by reverting to the history of the doctrine in England. It was found, to the satisfaction of the court, that "the reason in which the rule seems to have had its origin is applicable only to cases where the charge was of a felony." The reasoning may well be questioned, but the result should not be. When a desirable result is reached, as here, reasoning and logic matter little.
While this development was taking place, decisions were being rendered in actions for divorce based on adultery,\textsuperscript{101} in actions to recover penalties,\textsuperscript{102} and in bastardy proceedings,\textsuperscript{103} in none of which was more than a preponderance required. Wisconsin offers an interesting contrast. There, persuasion beyond a reasonable doubt is required in bastardy proceedings;\textsuperscript{104} "clear and satisfactory" proof in divorce proceedings;\textsuperscript{105} and a preponderance in other civil actions imputing or charging crime.\textsuperscript{106}

The present Illinois rule may be stated as follows The commission of a crime, which is in issue in a civil action, other than a divorce or a bastardy proceeding, an action to recover a penalty, or an action in libel or slander, must be proved beyond a reasonable doubt in those cases, and only in those cases, where the crime constitutes a felony, where it is pleaded and relied upon, and where it is charged against a party to the action.

It is a fair prophecy that Illinois will soon repudiate the doctrine, limited though it is, and hold that in all civil actions a crime today, and which would be excepted under the court's interpretation, were felonies then and would not have been excepted by the English courts. The Illinois court claimed to be following history. History, seemingly, would best have been served by applying the rule today to the same acts to which it was applied then. Sound reasoning would seem to require that the rule be applied to the acts, constituting the crime, rather than to any name by which those particular acts might be designated. It is believed that the court was conscious of the play upon the word "felony;" and resorted to its double-sensed use in order to support a result which it thought desirable. In so doing, it operated no differently than have all other courts, and other human beings.


\textsuperscript{102} Webster v. The People, (1853) 14 Ill. 365 (Action to recover a penalty in the name of the people); Hall v. Barnes, (1876) 82 Ill. 228 (Penalty for selling liquor to plaintiff's husband); City of Chicago v. Stone, (1914) 187 Ill. App. 90 (Penalty under an ordinance).

\textsuperscript{103} Mann v. The People, (1864) 35 Ill. 467; Maloney v. The People, (1865) 38 Ill. 62; Allison v. The People, (1867) 45 Ill. 37; The People v. Christman, (1872) 66 Ill. 162; Lewis v. The People, (1876) 82 Ill. 104; Cox v. The People, (1884) 109 Ill. 457; People v. Frowley, (1914) 185 Ill. App. 338. See also Miller v. Balthasser, (1872) 78 Ill. 302 (Assault and battery. Rape imputed).

\textsuperscript{104} Zweifel v. The State, (1871) 27 Wis. 396; Baker v. The State, (1879) 47 Wis. 111, 2 N. W 110; Van Tassel v. The State, (1884) 59 Wis. 351, 18 N. W. 328; Sonnenberg v. The State, (1905) 124 Wis. 124, 102 N. W. 233; Windahl v. The State, (1926) 189 Wis. 424, 207 N. W. 694.

\textsuperscript{105} Poertner v. Poertner, (1886) 66 Wis. 644, 29 N. W 386 (Leading case).

\textsuperscript{106} See Appendix op. Wisconsin.
preponderance of the evidence is sufficient to sustain a verdict. Michigan has known no other rule.

**Development in Michigan**

The question of proof of crime in a civil proceeding was raised in the supreme court of Michigan for the first time in 1875, in *Elliott v. Van Buren.* The action was one of assault and battery with attempt to ravish. The defendant moved for an instruction that the plaintiff could not recover unless the imputed crime, rape, was proved beyond a reasonable doubt. The trial court refused the defendant's motion and instructed that a preponderance was sufficient. Verdict and judgment were for the plaintiff, whereupon the defendant appealed on ground of erroneous instruction. In upholding the lower court's charge and the judgment, Judge Campbell, speaking for the supreme court, said:

"There is no rule of evidence which requires a greater preponderance of proof to authorize a verdict in one civil action than in another, by reason of the peculiar questions involved."

The *Van Buren Case* was followed in *Semon v. People,* a bastardy proceeding. It was followed and the rule reiterated in *People v Evening News Association,* a libel action based on charges of arson and murder. There, the court, again speaking through Judge Campbell, said, "The question is not an open one in this state." The court has not swerved from the course set by these cases, not even in cases based on fraud, or on fraudulent representation. The degree of the crime charged has made

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107(1875) 33 Mich. 49.
109(1879) 42 Mich. 141, 3 N. W 304.
110(1883) 51 Mich. 11, 16 N. W 185.
111(1883) 51 Mich. 11, 17, 16 N. W 185, 186.
PROOF OF CRIME IN A CIVIL PROCEEDING

no difference, nor the fact that it has been charged in the plead-
ings, nor that it has been charged against a party to the action.

THE PRESENT STATE OF THE LAW

Now for the law as it is today In libel or slander actions charging or imputing crimes, the number of states, requiring only a preponderance of the evidence to sustain the defendant's plea of justification, almost reaches unanimity. The nature of the crime—whether it be perjury, arson, murder, larceny, adultery or what not—makes no difference.

In civil actions to recover a statutory penalty, a preponderance is generally recognized as sufficient. Two states, Kentucky and Vermont are contra. The Kentucky rule is due to the interpretation given to the state constitution and to the civil and criminal codes. Vermont seems

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to have required the strict measure of proof in early days because of the dislike for forfeiture. Years have given weight to the old rule and it maintains its existence.

In bastardy proceedings a preponderance suffices in most states. Delaware, Maryland and Wisconsin require evidence beyond a reasonable doubt. The Maryland rule is statutory. It originated in 1781 and has been reenacted at various times since. Wisconsin, likewise, is influenced by statute. The Wisconsin statute is not so clear in its requirement of the strict measure of proof as is the Maryland statute. The Wisconsin court, seemingly, has given the statute its present construction. Alabama requires that the evidence must reasonably satisfy the jury. This seems to mean nothing more than a preponderance. In New York a bastardy proceeding is quasi-criminal and the evidence must be "entirely satisfactory." 

In disbarment proceedings, based on the charge of crime, where there has been no prior conviction, the courts seem about evenly divided as between "preponderance" and "reasonable doubt."


121Vail v. State, (1897) 1 Penn. (Del.) 8, 39 Atl. 451.


123Cases supra note 104.

124Md. Ann. Code, Bagby 1924, art. 12, par. 5.

125Wis. Stat. 1927 chap. 166.


127Miller v. The State, (1895) 110 Ala. 69, 20 So. 392; Bell v. The State, (1899) 124 Ala. 94, 27 So. 414; Lusk v. The State, (1900) 129 Ala. 30, 30 So. 33; White v. The State, (1911) 170 Ala. 1, 54 So. 430; Holston v. The State, (1917) 16 Ala. App. 30, 75 So. 175.

In actions to recover on an insurance contract, the defense being arson,\(^3\) or suicide,\(^3\) or theft,\(^3\) the great majority of jurisdictions favor preponderance. One state requires persuasion beyond a reasonable doubt under certain circumstances.\(^3\)

In contempt proceedings the question becomes one of whether it is a civil or a criminal contempt. The courts from the highest to-the lowest have wrestled with this most difficult problem. The difficulties have increased since 1920 by reason of the in-

\(^{129}\)People v. Sullivan, (1905) 218 Ill. 419, 75 N. E. 1005 (Beyond reasonable doubt. This would be subject, however, to Illinois limitation as to crime, pleadings, etc.). In re Darrow & Talbot, (1910) 175 Ind. 44, 92 N. E. 369 (Preponderance); In re Welcome, (1899) 23 Mont. 450, 59 Pac. 445 (to a reasonable certainty); Cf. State v. Wines & Booth, (1898) 21 Mont. 464, 54 Pac. 562; In re Spencer, (1923) 206 App. Div. 806, 201 N. Y. S. 315 (Preponderance); In re Elliott, (1904) 18 S. D. 264, 100 N. W. 431 (Clear and undoubted preponderance); In re Evans & Rogers, (1900) 22 Utah 366, 62 Pac. 913 (More than a preponderance. Clearly proved).


increased number of contempts resulting from violations of injunctions issued under the Volstead Act and similar state enforcement laws. The line between a civil and a criminal contempt is exceedingly fine.\textsuperscript{2} If the contempt is civil, a preponderance suffices.\textsuperscript{3} If criminal, proof beyond a reasonable doubt is generally required.\textsuperscript{4}

In divorce actions, where adultery is in issue, either as a part of the plaintiff's case, or as a part of the defense in a counter suit, or in recrimination, the majority of American courts are influenced by the public policy favoring the preservation of family life, and where children are involved, by the policy favoring their protection. Consequently, more than a preponderance is required. The expressions, "clear and satisfactory," "clear and convincing," "clear and conclusive," are used in designating the evidence required.\textsuperscript{5} Some few courts hold that a preponderance is sufficient.\textsuperscript{6} New Jersey requires proof beyond a reasonable doubt.\textsuperscript{7}


\textsuperscript{5}\textsuperscript{Lockhart v. Lockhart, (1920) 143 Ark. 276, 220 S. W 44; Neff v. Neff, (1921) 96 Conn. 273, 114 Atl. 126; Hoer v. Hoef, (1926)
In a miscellaneous group of cases—trespass for arson, for assault and battery with attempt to rape, for poisoning dogs; trover and conversion, imputing theft or embezzlement; assumpsit or account, imputing forgery; negligence, charging murder; etc., the requirement of preponderance prevails.

Although fraud is not ordinarily treated as a criminal offense, it may be desirable to mention the rule applied in civil actions based on fraud. A mere preponderance is usually held not enough. This is the rule in the federal courts and in

323 Ill. 170; 153 N. E. 658; Ellett v. Ellett, (1911) 157 N. C. 161, 72 S. E. 861; Jenkins v. Jenkins, (1922) 103 Or. 208, 204 Pac. 165; Taft v. Taft, (1907) 80 Vt. 256, 67 Atl. 703.


140Mead v. Hursted, (1884) 52 Conn. 53; Hale v. Matthews, (1888) 118 Ind. 527, 21 N. E. 43; Rippey v. Miller, (1854) 1 Jones (N. C.) 479; Bradish v. Bliss, (1862) 35 Vt. 326.


142Heiligmann v. Rose, (1891) 81 Tex. 222, 16 S. W. 931.


144Brown v. Tourtelotte, (1897) 24 Colo. 204, 50 Pac. 195; McDonald v. McDonald, (1895) 142 Ind. 55. 41 N. E. 336; Lewis v. Garrettson, (1881) 56 Iowa 278, 9 N. W. 214; Redden v. Tefft, (1892) 48 Kans. 302, 29 Pac. 157; McBee v. Bowman, (1890) 89 Tenn. 132, 14 S. W. 481.


146Nebraska National Bank v. Johnson, (1897) 51 Neb. 546, 71 N. W. 294 (Bill to impress trust on proceeds from stolen goods); Nelson v. Pierce, (1894) 18 R. I. 539, 28 Atl. 806 (Seduction); Trzebietowski v. Jereski, (1914) 159 Wis. 190, 149 N. W. 743 (Seduction); Stanton v. Sampson, (1876) 48 Vt. 628 (Action for damages for death of plaintiff's husband, killed by "X," to whom defendant had sold liquor); Weston v. Graylin, (1877) 49 Vt. 507 (Trespass, shooting with malice).
the majority of state courts. Here, as in the divorce actions mentioned above, the courts talk in terms of “clear and convincing,” “clear and satisfactory,” “clear and conclusive,” and “evidence of the most positive kind.” Four or five courts say a preponderance is sufficient. No modern decisions require proof beyond a reasonable doubt.

In England there are few cases on the question of proof of a criminal act in a civil cause. However, the trend seems to be toward the American view. A leading English authority on Evidence in his latest work goes so far as to say that the majority view in America is now the majority view in England.

CONCLUSION

In the majority of cases dealt with in this article, evidence had been submitted to a jury, and the legal question as to the quantum of proof arose in connection with the trial court’s instruction to the jury. There are, however, some cases, tried to


150See cases cited supra notes 23, 24, 25.

the court, in which the question arose. In such cases—usually actions for divorce, actions involving fraud, and the like—the question has generally been treated in the same manner as if trial had been to the jury. For instance, in proving fraud, the proof must be convincing to a trained judge, or such as would be regarded by an appellate court as sufficient to support the result reached by the trial court.

In conclusion it might be well to call attention to the fact that even in jury cases, where the evidence is sufficient to take the case to the jury, the verdict may little observe the distinction between "preponderance" and "reasonable doubt." The courts themselves are doubtful as to where the line between the two should be drawn. Juries are less apt to consider such technical distinctions, and where the jury brings in a general verdict, there is no way of knowing the weight given to the court's instructions. The correct instruction suffices for the court of review.

APPENDIX

The development of the law in each of the forty-eight states on the proof of a crime in a civil proceeding is presented in this Appendix.1

1For the rules in various jurisdictions in divorce proceedings involving adultery and actions involving fraud, see notes 137-139, and 147-149, supra.

ALABAMA. The first case raising the question settled the law in Alabama. This was Spruiil v. Cooper, (1849) 16 Ala. 791 (Slander—perjury). Preponderance sufficed. Same in Jordan & Sons v. Mann, (1877) 57 Ala. 595 (Action to recover penalty). In bastardy proceedings the jury must be "reasonably satisfied." This means no more than a preponderance. For citations of cases, see note 127, supra.

ARIZONA. No cases. In actions involving fraud, the proof must be "clear and satisfactory." Schwabach v. Jones, (1925) 27 Ariz. 260, 232 Pac. 558.


MINNESOTA LAW REVIEW

191 Calif. 280, 216 Pac. 368 (Will contest based on forgery), Fon v. Chambers, (1924) 68 Calif. App. 244, 228 Pac. 865 (Claim and delivery involving lottery tickets).


CONNECTICUT. Munson v. Atwood, (1861) 30 Conn. 102 (Action to recover penalty) settled the law in favor of preponderance. Has been consistently followed and applied. Hall v. Brown, (1862) 30 Conn. 551 (Penalty), Mead v. Husted, (1884) 52 Conn. 53 (Trespass, arson imputed), Fay v. Reynolds, (1891) 60 Conn. 217, 21 Atl. 418 (Bastardy), List v. Miner, (1901) 74 Conn. 50, 49 Atl. 856 (Damages for an indecent and felonious assault), Neff v. Neff, (1921) 96 Conn. 273, 114 Atl. 126 (Divorce—Adultery).

DELARWE. Problem seemingly has been presented in but one case, Vail v. State, (1897) 1 Penn. 8, 39 Atl. 451 (Bastardy). Persuasion beyond a reasonable doubt was required.

FLORIDA. "Reasonable doubt" rule was first applied. Schultz v. Pacific Ins. Co., (1872) 14 Fla. 73 (Insurance—Arson). This case was reluctantly followed in Williams v. Dickenson, (1891) 28 Fla. 90, 9 So. 847 (Trespass—Arson). An exception seems to have been made in bastardy cases. E. N. E. v. State ex rel. L. E., (1899) 25 Fla. 268, 6 So. 58. The Schultz and Williams cases were expressly disapproved in Abraham v. Baldwin, (1906) 52 Fla. 151, 42 So. 591 (Slander—Theft) and "preponderance" rule applied. Sovereign Camp, W. O. W v. Hodges, (1916) 72 Fla. 467, 73 So. 347 (Insurance—Suicide) followed the Baldwin decision. Preponderance is the rule today.


IDAHO. Question has never been raised. Proof of adultery in divorce proceeding must be clear and conclusive. Brown v. Brown, (1915) 27 Idaho 205, 148 Pac. 45.

ILLINOIS. For the development in Illinois, see text pp. 570-76, supra.

INDIANA. Indiana was one of the states, which, after carrying the "two witness" rule over into slander—perjury causes, confounded this "two witness" rule with the "reasonable doubt" rule and applied the latter, to gather with the former, in slander—perjury cases. Two early decisions, Offutt v. Earlywine, (1838) 4 Blackf. (Ind.) 4660 and Byrket v. Monohon, (1844) 7 Blackf. (Ind.) 83, are responsible for the application of the "two witness" rule in a civil case. Both were actions in slander for charging perjury. Neither required evidence beyond a reasonable doubt. The second of the two was cited as authority for the "reasonable doubt" rule and that rule applied in Lanter v. McEwen, (1847) 8 Blackf. (Ind.) 495 (Slander—perjury). Three cases from other states were also cited as authorities, all of which were erroneously construed. From slander—per-
PROOF OF CRIME IN A CIVIL PROCEEDING

jury actions, the “reasonable doubt” rule was extended to slander actions charging other crimes. Wonderly v. Nokes, (1848) 8 Blackf. (Ind.) 589—extended it to a slander—larceny situation. These cases were followed in Landis v. Shanklin (1848) 1 Ind. 92 (Slander—larceny), Gants v. Vinard, (1849) 1 Ind. 511 (Slander—perjury), Shoutly v. Miller, (1849) 1 Ind. 544 (Slander—larceny), Swails v. Butcher, (1850) 2 Ind. 84 (Slander—perjury), Tucker v. Call, (1873) 45 Ind. 31 (Slander—larceny. The court refused to change the rule); Hutts v. Hutts, (1878) 62 Ind. 214 (Slander—perjury), Fowler v. Wallace, (1891) 131 Ind. 347 (Slander—Embezzlement). Established rule reluctantly followed. Elliott, C. J., felt that a change, if any, should be made by the legislature. Strong dissent by Olds, J.). Legislative action was taken and the “reasonable doubt” rule was abrogated in all slander or libel actions in 1897. Acts of 1897, p. 137, now sec. 400 Ind. Ann. Stat. (Burns, 1926).

During the fifty years prior to the statute, the doctrine was strictly confined to slander or libel actions in which a crime was charged. Moral turpitude was not enough. Wilson v. Barnett, (1873) 45 Ind. 163 (Slander—fornication). In this case there is also a dictum to the effect that the crime must be pleaded. In all other civil actions, charging or imputing crime, a preponderance of the evidence suffices. Redden v. Tefft, (1892) 48 Kans. 302, 29 Pac. 157 (Ejectment; defendant in possession under forged deed), State ex rel. v. Law, (1914) 93 Kans. 357, 144 Pac. 232 (Bastardy), State ex rel. v. Woods, (1918) 102 Kans. 499, 170 Pac. 986 (Bastardy).


MAINE. Proof beyond a reasonable doubt was required at one time in Maine. Thayer v. Boyle, (1849) 30 Me. 475 (Trespass for burning a

MARYLAND. McBee v. Fulton, (1877) 47 Md. 403 (Slander—indecency exposure) first raised the question. Preponderance was held to be sufficient. Followed in Wagoner v. Wagoner, (1887) 10 Atl. 221 (Divorce—adultery). Rule in divorce proceedings has now been changed. "Clear, satisfactory and convincing" proof is required today. Cashell v. Cashell, (1927) 153 Md. 170, 137 Atl. 904. Bastardy proceedings are criminal proceedings by statute. Sec. 5, Art. 12, Md. Ann. Code (Bagby, 1924). Proof beyond reasonable doubt is required. Norwood v. State, (1876) 45 Md. 68. The statute or like statutes have been in existence since 1781.


MICHIGAN. For development in Michigan, see text pp. 576-77, supra.

MINNESOTA. Question first considered in Burr v. Wilson, (1875) 22 Minn. 206 (Action in nature of deceit, violation of a criminal statute being implied). Since there was no issue of crime raised by the pleadings, a preponderance of evidence was held to be sufficient to establish the plaintiff's case. Unnecessary to determine the measure of proof where crime charged in the pleadings. That particular point was raised and decided in favor of "preponderance" in Thoreson v. Northwestern Nat'l Ins. Co., (1882) 29 Minn. 107, 12 N. W. 154 (Action on fire insurance policy. Defense, conspiracy to defraud, a crime). The Thoreson case was cited and followed in State v. Nichols, (1882) 29 Minn. 357 13 N. W. 153 (Bastardy). "Preponderance" rule has been consistently applied. Lahr v. Kraemer, (1903) 91 Minn. 26, 97 N. W. 418 (Action to recover for services. Counterclaim, embezzlement) Frey v. McManus, (1923) 154 Minn. 175, 191 N. W. 392 (Assault and battery—rape), State v. Schmidt, (1923) 155 Minn. 440, 193 N. W. 954 (Bastardy).

MISSISSIPPI. No cases directly raising the question. In Banks v. Banks, (1918) 118 Miss. 783, 79 So. 841 (Divorce—Recrimination) it was held that the circumstances, by which the offense of adultery was sought to be established, must be proven with reasonable certainty.


Montana. The question has been presented in one case, a disbarment proceeding, In re Welcome, (1899) 23 Mont. 450, 59 Pac. 445 (Bribery charged). Proof beyond a reasonable doubt required in criminal cases only. Here, the court must be reasonably certain of guilt.


Nevada. No cases. Fraud must be "clearly and satisfactorily" proved. Nevada Mining and Exp. Co. v. Rae, (1923) 47 Nev. 173, 218 Pac. 89.


New Mexico. No cases. In actions involving fraud, the proof must be "clear, conclusive and satisfactory." Berrendo Irr. Co. v. Jacobs, (1917) 23 N. M. 290, 168 Pac. 483.

New York. The question has been considered in some twenty-five or more cases in this state. Very few of these have been considered by the highest state court. The uncertainties that existed are traceable to the case of Woodbeck v. Keller, (1826) 6 Cow. (N.Y.) 118 and its offspring, Clark v. Dibble, (1837) 16 Wend. (N.Y.) 601, Hopkins v. Smith, (1848) 3-Barb. (N.Y.) 599. As shown in the text, pp. 564-65, supra, these cases merely applied the "two witness" rule to civil actions in slander based on perjury. Courts and lawyers were prone to consider them as establishing the "reasonable doubt" degree of evidence, also. The three cases were properly construed and distinguished, and "preponderance" rule applied in Johnson v. Agricultural Ins. Co., (1881) 25 Hun 251 (Insurance—arson). They were confined to their true limits by the court of appeals in People v. Briggs, (1889) 114 N. Y. 56, 20 N. E. 820, affirming 47 Hun 266 (Action to recover penalty. Preponderance). These, two cases, together with an earlier case—N. Y. Guaranty & Indem. Co. v. Gleason, (1879) 78 N. Y. 503 (Forgery involved)—and an intervening case—New York Ferry Co. v. Moore, (1896) 102 N. Y. 667, more fully reported in 6 N. E. 293 (Conversion—theft) seemingly should have settled the question. Subsequent litigation, despite the fact that the preponderance rule was consistently applied, indicated otherwise. Davis v. Rome R. R. Co., (1890) 36 Hun (N. Y.) 372, 10 N. Y. S. 334 (Embezzlement involved), Lewis v. Shull, (1893) 67 Hun (N. Y.) 543, 22 N. Y. S. 484 (Slander—theft), and Weir v. Aetna Ins. Co., (1895) 91 Hun (N. Y.) 217, 36 N. Y. S. 216 (Insurance—arson) were such cases. None were expressed from the highest court. Any doubts that may have been entertained relative to the Court of Appeals' thoughts upon the matter were definitely set at rest in Kurz v. Doerr (1904) 180 N. Y. 88, 73 N. E. 926 (Damages for felonious assault with a firearm). This decision settled the law in favor of "preponderance." An exception has existed and continues to exist in bastardy cases. They are considered quasi criminal and require proof that is "entirely satisfactory." Commissioner of Public Charities v. O'Keefe, (1917) 180 App. Div. 667, 168 N. Y. S. 240.


Ohio. Lexington Ins. Co. v. Paver, (1847) 16 Ohio 324 (Insurance—arson. Beyond a reasonable doubt.) This is the only Ohio decision requiring the strict degree of proof. It has never been expressly overruled. The court would not extend the doctrine to actions involving fraud in Strader v. Mullane, (1867) 17 Ohio St. 624, or in Jones v. Greaves, (1874) 26 Ohio St. 2. The doctrine was restricted to insurance and slander cases by the decision in Lyon v. Fleahman, (1877) 34 Ohio St. 151 (Action to recover penalty). The Lexington Ins. case was implicitly overruled and the doctrine thrown overboard in Bell v. McGinniss, (1883) 40 Ohio St. 204 (Slander—stealing horse). No case has raised the question since 1883, indicating that the law is considered as settled in favor of preponderance.

Oklahoma. Problem presented in bastardy and divorce proceedings. "Preponderance" is the rule in these. Libby v. State, (1914) 42 Okla. 603, 142 Pac. 406 (Bastardy), Powelson v. State, (1917) 69 Okla. 72, 169 Pac. 1093 (Bastardy), Evans v. Evans, (1926) 123 Okla. 9, 252 Pac. 837 (Divorce — adultery.)


Pennsylvania. The confounding of "two witness" rule and the "reasonable doubt" rule has disturbed the law in Pennsylvania. Steinman v. McWilliams, (1847) 6 Pa. St. 170 and Gorman v. Sutton, (1858) 32 Pa. St. 247 applied the "two witness" rule in slander-perjury actions. They did nothing more. Both have been cited as authority for persuasion beyond a reasonable doubt. In Burford v. Wible. (1858) 32 Pa. St. 95 (Slander — Forcement) a dictum, requiring "reasonable doubt," is to be found. Woddrop v. Thacher, (1887) 117 Pa. 340, 11 Atl. 621, (Slander — embezzlement) required a preponderance, the proof of crime being introduced under a plea of not guilty. Had justification been the plea, the court intimates the strict degree of proof might have been required. The legislature dispelled the doubts, relative proof of justification in slander actions, by making the "preponderance" rule statutory. Act of April 11, 1901, Sect. 2 P.L. 74. Sacchetti v. Fehr, (1907) 217 Pa. 475, 66 Atl. 742 (Libel — perjury) applied the statute. In other civil cases, involving crimes, preponderance prevailed. Continental Ins. Co. v. Delpeuch, (1876) 82 Pa. St. 225 (Insurance — suicide), Somerset Co. Ins Co. v. Usaw, (1886) 112 Pa. 80, 4 Atl. 355 (Insurance — arson).

Rhode Island. Two cases. They are accepted as decisive of the law in R. I. Both apply the "preponderance" rule. State v. Bowen, (1883) 14 R. I. 165 (Bastardy), Nelson v. Pierce, (1894) 18 R. I. 539, 28 Atl. 806 (Seduction).


Tennessee. Coulter v. Stuart, (1828) 2 Yerg. (Tenn.) 225 decided that the "two witness" rule should be applied in slander-perjury actions when justification was pleaded. A dictum to the effect that proof must be beyond a reasonable doubt was the source of some uncertainty for a number of years, the doubt not being removed until 1909, when the decision in Lay v. Linke, (1909) 122 Tenn. 433, 123 S. W. 746 renounced the authority of this dictum and definitely established the "preponderance" rule. Prior to this decision the court had not stood still. Stovall v. State, (1877) 9 Baxter (Tenn.) 597 settled the question in bastardy proceedings in favor of preponderance. Cox v. Crumley, (1880) 5 Lea (Tenn.) 529 held a preponderance sufficient in an action for damages sustained at the hands...


Wisconsin. The question was presented for the first time, and decided in favor of preponderance, in Washington Union Ins. Co. v. Wilson, (1859) 7 Wis. 169 (Insurance—arson). A preponderance sufficed in all civil proceedings, except bastardy proceedings, divorce proceedings involving adultery, and actions involving fraud, until 1914. Blaeser v. Milwaukee, etc., Ins. Co., (1875) 37 Wis. 31 (Insurance—arson), Kidd v. Fleek, (1879) 47 Wis. 443, 2 N. W 1121 (Slander—larceny. Dictum), U. S. Express Co. v. Jenkins, (1889) 73 Wis. 471, 41 N. W 957 (Money had and received—theft), Bachmeyer v. Mutual Reserve Ass'n, (1894) 87 Wis. 325, 58 N. W 399 (Insurance—suicide) Agnew v. Farmers Ins. Co., (1897)
Proof of crime in a civil proceeding


Adultery in divorce proceedings was first held to require proof beyond a reasonable doubt. Freeman v. Freeman, (1871) 27 Wis. 396. This decision was discussed in Poertner v. Poertner, (1886) 66 Wis. 644, 29 N. W 386. It was held that the "reasonable doubt" talk in Freeman v. Freeman was gratuitous, and unnecessary for the decision of that case. Poertner v. Poertner was considered as presenting the issue in a divorce proceeding for the first time. The court clearly stated that it saw no reason for distinguishing between a divorce proceeding, involving a crime, and any other civil proceeding, involving a crime. A preponderance sufficed in other civil actions, therefore, the same amount should suffice in a divorce action. Unfortunately, however, that amount was described as being a "clear and satisfactory preponderance"—unfortunate, because of its effect in later years. Such language had not been used in the prior cases. The court evidently had in mind the majority requirement of "clear and satisfactory" proof of adultery in divorce proceedings.

In 1914 came the decision in Trzebietowski v. Jereski, (1914) 159 Wis. 190, 149 N. W 743 (Damages for seduction—Statutory rape imputed). The trial court had charged that a "fair preponderance to a reasonable certainty" was necessary. On appeal the supreme court stated the proper charge to be a "clear and satisfactory preponderance," citing Poertner v. Poertner and several fraud cases. However, the judgment was affirmed, since the defendant had been sufficiently favored. The term "clear and satisfactory preponderance" was taken from Poertner v. Poertner, no other case ever having used it. There, it meant no more than a preponderance. Here, and in the subsequent cases—Peterson v. Lemke, (1915) 159 Wis. 353, 150 N. W 481 (Assault with intent to rape), O'Brien v. Kroner Hardware Co., (1921) 175 Wis. 238, 185 N. W 205 (Negligence—Capacity of an infant to commit a crime involved. Dictum)—"clear and satisfactory preponderance" means more than a preponderance. The court has taken a backward step. It probably was influenced (1) by the fact that "clear and satisfactory" evidence in fraud cases means more than a preponderance; and (2) by the expression employed in the Poertner case, due consideration not having been given to its meaning as there used.

Wyoming. No cases. Fraud must be clearly and distinctly proved. Williams v. Yokum, (1928) 37 Wyo. 432, 263 Pac. 607