A Mathematical Approach to the Law

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By

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Where the quantum of evidence is in equipoise, the party sustaining the onus probandus must fail, leaving the status quo undisturbed. This proposition is similar to the rule that if an appellate court is evenly divided in its decision, the judgment of the trial court must stand, again leaving the status quo undisturbed. The foregoing doctrine of equipoise is slightly modified only in its application by a court of chancery, which is partial to that aspect of a transaction which is most acceptable to common commercial custom.

In an ordinary civil case, the affirmative burden of proof incumbent upon the plaintiff is upheld if the evidence adduced by the plaintiff disturbs the condition of equipoise in the plaintiff's favor. The plaintiff's evidence requisite to disturb the condition of equipoise must amount to a preponderance of the quantum of combined evidence adduced by both the plaintiff and the defendant. The Code of Georgia of 1933 defines preponderance of evidence as "...that superior weight of evidence upon the issues involved, which, while not enough to wholly free the mind from a reasonable doubt, is yet sufficient to incline a reasonable and impartial mind to one side of the issue, rather than to the other."1

The minimum preponderance of evidence necessary to disturb the condition of equipoise consists of 51% of the quantum of evidence introduced by both parties. Mr. Justice Glenn of the Appellate Court of Illinois declared in Leggett v. Illinois Central Railroad Company that: "...a bare preponderance is sufficient, though the scales drop but a feather's weight."2 Mr. Justice Bond of the St. Louis, Missouri Court of Appeals stated in Bauer Grocery Company v. Sanders: "When the equilibrium of proof is destroyed, it matters not how slightly, the jury in a civil action are warranted in rendering a verdict in favor of the side to which the beam tilts."3

However, certain classes of civil cases require a greater preponderance than the minimum in order to disturb the condition of equipoise. Judge Sutphen of the Supreme Court of Idaho in Molyneux v. Twin Falls Canal Company declared as follows: "In certain classes of cases a degree of proof greater than a bare pre-

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2 72 Ill. App. 577, 579 (1897).
3 74 Mo. App. 657, 660 (1898):
ponderance may be required. . . The instant case, wherein the appellant seeks to prove that a written contract was orally modified and rescinded, is one of such cases. The Courts usually require that the evidence of an oral rescission or modification of a written contract should be 'clear and convincing' or 'clear and satisfactory.' It is clearly apparent that the words 'positive and unequivocal' have a stronger meaning than 'clear and satisfactory' or 'clear and convincing.' The instruction in question related to one of the important issues in the case, and placed upon appellant a greater burden of proof than the law requires and was prejudicial."

The highest burden of proof is the criminal burden of beyond a reasonable doubt, although there is a seventy-two year old precedent whereby Mr. Justice Leland of the Appellate Court of Illinois in Shugart v. Halliday stated that: "This instruction says, 'such intent to dedicate must be unequivocally and satisfactorily proven.' This is a stronger expression than 'beyond all reasonable doubt.'" According to Mr. Chief Justice Fuller of the United States in Fidelity Mutual Life Association v. Mettler, "Proof to a 'moral certainty' is an equivalent phrase with 'beyond a reasonable doubt.'" Page's Ohio General Code Annotated of 1939 defines reasonable doubt as follows: "It is not a mere possible doubt, because everything relating to human affairs or depending upon moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge." The criminal burden of proof is the highest burden of proof because, according to Mr. Chief Justice Nichols of Ohio in Merrick v. Ditzler, "in criminal cases in all civilized countries the degree of proof is enhanced beyond that of civil cases in the degree that the state has a more jealous concern for the lives and liberties of its inhabitants than it can possibly entertain for property rights. The burden of all such prosecutions is to prove every essential element of the crime beyond a reasonable doubt."

The State's evidence requisite to disturb the condition of equipoise in a criminal proceeding must amount to 90% of the quantum of combined evidence adduced by both the State and the defendant. The 10% represents a handicap extended to the public prosecutor due to recognized human frailty. Therefore, the 'clear and convincing' or 'clear and satisfactory' preponderance of evidence in certain classes of civil cases lies about half-way between the bare preponderance of evidence in ordinary civil cases and the moral certainty in criminal cases and thus amounts to 70% of the quantum of combined evidence adduced by both the plaintiff and the defendant. This same figure, 70%, also represents that amount of

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5 2 Ill. App. 45, 51 (1878).
8 91 Ohio St. 256, 261, 110 N. E. 493, 494 (1915).
the quantum of combined evidence adduced by both the plaintiff and the defendant which is at variance with a decision and which, therefore, justifies a reversal on appeal. Mr. Justice Harrison of the Supreme Court of Nebraska in *Western Cornice Manufacturing Works v. Leavenworth* declared that: "In an appeal, in this state, the hearing in the appellate court may be said to be a trial de novo,—a retrial of the same issues on the same record, subject, however, to the rule in regard to questions of fact that the supreme court, though trying a case de novo on appeal, will not disturb the finding of a district court based on conflicting evidence, unless such finding is clearly wrong."9

The criminal burden of proof is required in a certain type of civil case, namely a workmen’s compensation case in which an employer defends against a claim on the ground of the employee’s previous condition. The employer must, according to the Workmen’s Compensation Bureau of the New Jersey Department of Labor in *Frayer v. United Cork Company*, “prove such condition to have existed without any reasonable doubt.”10 There are two eighty-eight year old precedents to the effect that the criminal burden of proof is also required in a suit to recover a forfeiture and in a proceeding to set aside a will on the ground that it was not executed or attested in pursuance of statute. Mr. Justice Aldis of the Supreme Court of Vermont in *Riker v. Hooper* stated that: "This is a suit to recover a forfeiture, and therefore the rule of evidence in criminal cases applies, that all the facts material to sustain the suit must be proved beyond a reasonable doubt.”11 Judge Denio of the Court of Appeals of New York in *Tarrant v. Ware* declared that: "But if, on examining all the witnesses and considering the attending circumstances, a reasonable doubt remains whether one or more of the directions of the statutes have not been omitted, the probate must be refused, although it may appear probable that the paper expresses the testator’s intentions.”12

The criminal burden of proof is required in a civil case in which a criminal act is alleged in the pleadings in the courts of the State of Illinois and in bankruptcy proceedings in which a specification in bar of a bankrupt’s discharge charges that the bankrupt willfully swore falsely in his examinations. Mr. Justice Baker of the Supreme Court of Illinois in *Germania Fire Insurance Company v. Klewer* stated that: "In this State it has been held that where, in civil cases, a criminal offense is charged in the pleadings, such offense must be proved beyond a reasonable doubt.”18 Judge Fox of the District Court of the United States for the District of Maine in *In Re Moore* declared that: "The charge therefore is that of willful falsehood, and is a question of fact submitted to me, for my decision, involving a trial of the bankrupt for the crime of perjury. The consequences being

9 52 Neb. 418, 423, 72 N. W. 592, 594 (1897).
11 35 Vt. 457, 461 (1862).
12 25 N. Y. 425, 429 (1862).
18 129 Ill. 599, 612 (1889); McInturff v. Insurance Company of North America, 248 Ill. 92, 99, 93 N. E. 369, 372 (1910).
of such extreme importance, in determining the question, I must be governed by
the rules of law regulating the trial of an indictment for perjury. The creditors
should satisfy my mind beyond a reasonable doubt, that this bankrupt has in-
tentionally and willfully given false testimony in relation to this matter."14

14 17 F. Cas. No. 9,751, 663, 666, 1 Hask. 134 (1868).