

6-1949

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Recommended Citation

M. S. Whaley, Variations in Burden of Proof in South Carolina, 1 S. C. L. Q. 420 (1948).

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VARIATIONS IN BURDEN OF PROOF IN SOUTH CAROLINA

M. S. WHALEY*

One often thinks of the burden of proof as resolving itself into two rules or two degrees of proof: one for the criminal case known as the reasonable doubt rule, the other for the civil case and known as the preponderance rule. But there is more to it than that.

Although there is nothing complex with regard to the state's burden, it being to prove guilt beyond a reasonable doubt and that a reasonable doubt is such as "would arise in the mind of an honest man who is earnestly seeking to know the truth,"¹ yet when that rule has to operate concomitantly with one also placing a burden on the defendant in such a case, the simplicity of the rule tends to be lost in the dual operation.

When the defense of insanity enters a murder situation, one finds the preponderance rule coming into the picture and functioning along with that of reasonable doubt as to what, in the last analysis, is the same issuable fact, namely, a state of mind.² Incongruously they impinge on one another and even the legally trained mind must with effort state their dual functioning in the following language:

"In order to make out such defense, as it seems to us, sufficient proof must be shown to overcome in the first place the presumption of sanity and then any other proof that may be offered. This need not be done 'beyond a reasonable doubt,' for that would be a misapplication of the rule, which only applies to the evidence to sustain the charge on the part of the State, but by 'the preponderance of evidence,' showing want of sanity with reasonable certainty; this degree of evidence on the part of the defendant answering to and satisfying the

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1. *State v. Bramlett*, 114 S. C. 389, 103 S. E. 755 (1920).
2. *State v. Bundy*, 24 S. C. 439 (1886).

requirement that the State must establish every element of the crime charged 'beyond a reasonable doubt.' 'Where the State fully proves a *prima facie* case, and a special defense, such as insanity, alibi, etc., is interposed, it must be established only by such a preponderance of evidence as will satisfy the jury that the charge is not sustained "beyond all reasonable doubt." ' "

One wonders what must be the mental reaction of the untrained lay mind on the jury panel to this legal yardstick and whether, after all, it is ever really applied.

It will be noted from the above quotation that the dual functioning of the two rules was also mentioned as pertaining when the defense of alibi entered the legal picture. And yet, although it took decades for there to be recognized the utter inconsistency of having the state prove beyond a reasonable doubt that the defendant was present when the crime was committed and the defendant having to prove only by a preponderance that he was not present, nevertheless the inconsistency was eventually recognized and the burden of proving such a defense taken off a defendant entirely. He need now create only the necessary reasonable doubt.³

Will the time come when the defense of insanity will re-take its place alongside that of its legal twin—alibi—and again be subject to the same burden, or will the two, which were in 1885 placed in the same category, henceforth follow separate legal grooves, the one of insanity requiring a "preponderance" showing "want of sanity with reasonable certainty," while the state has to prove guilt beyond a reasonable doubt, and the other of alibi requiring only that a reasonable doubt be cast on the issuable fact of presence of the defendant?

Self-defense in the criminal side still remains in the preponderance column,⁴ with the consequent linguistic clang of reasonable doubt and greater weight resounding in the consciousness of the triers of fact where the two degrees of proof—the one, the greater; the other, the lesser—must vie for eventual supremacy.

Even in civil cases, there can be issues calling for the

3. *State v. McGhee*, 137 S. C. 256, 135 S. E. 59 (1926).

4. *State v. Moss*, 77 S. C. 391, 57 S. E. 1098 (1907).

reasonable doubt rule. In 1925⁵ the Supreme Court said, in a suit on a bond which indemnified against "fraud, dishonesty, forgery, theft . . .", that "the rule is so well established that a plaintiff in the Court of Common Pleas is only required to prove his case by the greater weight of the evidence as not to require even citation of authority. Any other rule would only produce 'confusion worse confounded'. If there be any statements in any of the cases to the effect that the 'preponderance of evidence' rule is not universal in the Common Pleas Court, such statement and such case is so glaringly and utterly in opposition to the law and practice of the Courts as to be entirely disregarded."

Judge Ramage who wrote that opinion, which had no dissent, was at that time a circuit judge. He told the writer that the object of the decision was to henceforth have one rule only for civil causes. However, within a few years, it was held in a slander suit as to the plea of justification that on the civil side the rule in a criminal case was applicable.⁶ It may be noted that the Justices were not in favor of the result but felt compelled to make the burden as to such an issue an exception to the rule in the *Salley* case. That case was not cited, but again a unanimous opinion declared:

"The general rule in civil cases is that a party having the burden of an issue shall succeed upon that issue if he can bring to his aid a preponderance of the evidence. We know of no exception to this rule in this State, except in the case of slander where the defendant justifies the speaking of words which charge the plaintiff with the commission of a criminal offense. Many eminent lawyers and jurists have condemned the rule in this class of cases. However, the rule has been settled and followed in this State for more than fifty years, and we feel it our duty to give it stare decisis effect, much as we may favor the unification of the rules of evidence. Doubtless if the operation of the rule had resulted in general disapproval, a change would have been brought about by legislation, as has been done in several other jurisdictions."

5. *Salley, Rec'r. v. Globe Indemnity Co., et al*, 133 S. C. 342, 131 S. E. 616 (1925).

6. *Smith v. Smith*, 194 S. C. 247, 9 S. E. (2d) 584 (1920).

Since in the foregoing case the Court did not see fit to exercise its inherent power to make the common law meet its boast of keeping abreast of the times by (as Judge Cardozo puts it) "judicial legislation", it is left to legislative action to accomplish the unifying objective.

Other than the exception now existing on the civil side by virtue of the *Smith* case, *supra*, one would think, at this point, that he could stop and rest assured that there was only one rule as to burden of proof in civil cases. If he did, he would be surprised. At the next turn on this portion of the legal highway he would stumble over a yardstick to which the court could give no definite name, but, like with defining "tort", could only characterize. And so, one finds that we now have with us a burden of proving an issue by "strong, cogent, convincing evidence, *more than a preponderance*" (italics added). And, one might add: less than a reasonable doubt.

This burden is an unnamed "betwixt and between". It functions in fraud and breach of trust cases.⁷

There is another rule, also unnamed but characterized and to be found only through the means, namely, the evidence necessary to attain it. It is obviously *much* more than a preponderance and a *little* less than beyond a questionable doubt. So much one gathers from a recent opinion in a case involving specific performance of a parol contract to devise property.⁸ The Court said in the case just noted:

"Courts do not countenance specific performance of parol contracts to devise unless the evidence *compels conviction* that there was such a contract and that it has been performed by the promisee unless complete performance becomes impossible through no fault of the latter. The ordinary rule of preponderance or greater weight of the evidence, applicable to civil actions generally, is insufficient in this class of cases; some Courts require proof beyond a reasonable doubt, as on the criminal side; universally a higher degree of conviction of truth is necessary than in the usual civil case."

7. *Searson v. Webb*, 208 S. C. 453, 38 S. E. (2d) 654 (1946).

8. *Young v. Levy*, 206 S. C. 1, 32 S. E. (2d) 889 (1945).

Also, in the same opinion:

"The terms of such an agreement should be definite and certain and established by evidence clear and convincing."

As to cases for reformation of written instruments where the issues of mistake and mutuality are involved, there is yet another unnamed but only characterized yardstick, which appears to be nearer the preponderance and, therefore by that much, farther removed from the beyond a reasonable doubt. Both such issues must be proved by "clear and convincing testimony."⁹

In workman's compensation cases,¹⁰ there are times when the measure of proof changes. It is nearer the preponderance than the reasonable doubt, in that a claimant, when depending on expert opinion testimony, must show a casual connection between the accident and his injury was "most probable"; not that the *greater probability* should be that there was such a connection, which latter is the normal criterion of a "preponderance".

One wonders what South Carolina would do regarding the degree of proof necessary in pedigree cases for establishing a declarant's connection with the family which is the subject of his declaration. Elsewhere, when the problem has arisen, it has been solved by swinging the burden of proof pendulum far to the other side of the legal arc and requiring only slight proof.¹¹ To require anything like a preponderance would usually work an injustice. As said in the case just noted:

"It may prove a hardship now and then to require even slight evidence of the relationship of a decedent to the family of which he declares before his declarations will be received, but the consequences of the contrary rule would inevitably be much more serious."

9. Moore v. Jeffords, 195 S. C. 512, 12 S. E. (2d) 737 (1941).

10. Ashley v. S. C. Highway Department, 213 S. C. 354, 49 S. E. (2d) 505 (1948).

11. Aalholm v. People, 211 N. Y. 408; 105 N. E. 647 (1914).