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# NOTE

## VARIABLE VERBALISTICS—THE MEASURE OF PERSUASION IN TENNESSEE

[B]ut who are we that we should insist on certainties in a world of no more at best than probabilities?

*Learned Hand*  
*The Bill of Rights*

### SCOPE AND BACKGROUND

In a trial one party always has the affirmative burden of persuading the finder of fact to adopt his allegations as true. This burden is met by inducing a particular degree of belief in the mind of the fact finder.<sup>1</sup> Manifestly, absolute truth is not attainable in a lawsuit. Rather certain facts are found to exist from all the evidence presented and these findings labeled true for the purposes of the case. Since different factual situations require different measures of persuasion, it is necessary that the fact finder, whether judge or jury, know and understand the particular measure applicable in order to make a correct determination as to a fact in issue. If trial is by jury,<sup>2</sup> it is the duty of the judge

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1. "Burden of persuasion" refers to the second element of the burden of proof. The two elements are: (1) the risk of non-production of the evidence and (2) the risk of non-persuasion of the jury. The former is more aptly termed the burden of producing evidence, and presents a problem for the judge. The burden of persuasion normally presents a jury question. See 1 MORGAN, *BASIC PROBLEMS OF EVIDENCE* 17-29 (1957). For general discussions see also McCORMICK, *EVIDENCE* §§ 306-22 (1954); 9 WIGMORE, *EVIDENCE* § 2498a (3d ed. 1940); Fisk, *Burden of Proof*, 1 U. CIN. L. REV. 257 (1927); Thayer, *The Burden of Proof*, 4 HARV. L. REV. 45 (1890). See also MODEL CODE OF EVIDENCE rule 1, comments on paragraphs (2) and (3) (1942) and compare with UNIFORM RULE OF EVIDENCE 1(4), comment subdivision 4 (1953).

Tennessee cases make a distinction between the primary and secondary sense of burden of proof, terming the former as that burden which rests upon the party against whom judgment would be rendered if no evidence were introduced; while the latter is deemed that burden to rebut the prima facie case made out by the party bearing the primary burden. See *Memphis Sav. Bank v. Union Bridge & Const. Co.*, 138 Tenn. 161, 196 S.W. 492 (1917); *Woodward v. Insurance Co.*, 104 Tenn. 49, 56 S.W. 1020 (1900); *Jewett v. Graham*, 62 Tenn. 16 (1873). See also CARUTHERS, *HISTORY OF A LAWSUIT* § 331 (7th ed., Gilreath 1951); Note, 10 VAND. L. REV. 563 (1957). A further distinction is made between proof and evidence in that the former is the end whereas the latter is the means by which this tends to be established. See GIBSON'S *SUTTS IN CHANCERY* § 449 (5th ed., Crownover 1955).

2. In Tennessee, issues of fact are generally tried by the jury in both civil and criminal cases. The jury in a civil case is bound by the law as given in the charge. See TENN. CONST. art. 6, § 9. See also *Haskins v. Howard*, 159 Tenn. 86, 16 S.W.2d 20 (1928); *Ferguson v. Moore*, 98 Tenn. 342, 39 S.W. 341 (1897); *McCorry v. King's Heirs*, 22 Tenn. (3 Humph.) 266 (1842); *Finks v. Gillum*, 38 Tenn. App. 304, 273 S.W.2d 722 (M.S. 1954). However, in criminal cases, the jury may determine the law for itself in disregard of the charge. See TENN. CONST. art. 1, § 19. See also *State v. Vincent*, 147 Tenn. 458, 249

to instruct to this end. The purpose of this note is to examine language used in instructing as to the measure of persuasion or prescribed degree of belief as approved by Tennessee courts. The allocation of the burden of proof or the effects of a presumption upon such burden are not treated herein except to the extent necessary to determine their effect upon the language used.<sup>3</sup>

Since jurors are not selected on the basis of their skill or experience as fact finders, a charge should convey the proper standard for determining the requisite degree of belief in the most direct and succinct way possible.<sup>4</sup> This, however, has seldom been the case. The charge as to burden of persuasion has generally evolved into a ritualistic chant, both complicated and confusing.<sup>5</sup>

The ordinary juror, when left to his own devices and without the benefit of an understandable guide, will probably determine the issues through an instinctive sense of right and wrong.<sup>6</sup> It is not argued that this necessarily produces unjust results, but it is contended that uniformity and predictability within the law can be better insured by decisions rendered in adherence to a well defined legal guide rather than by intuition. It seems feasible to surmise that a jury will make an effort to adhere to the mandates of a charge when given in understandable terms capably expressing the expectations of the law. Concededly, words which are both adequately expressive and easily

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S.W. 376 (1922); *Powers v. State*, 117 Tenn. 363, 97 S.W. 376 (1906); *Ford v. State*, 101 Tenn. 454, 47 S.W. 703 (1898); *Poole v. State*, 61 Tenn. 288 (1872); *Nelson v. State*, 32 Tenn. (2 Swan) 481 (1852); *Dale v. State*, 18 Tenn. 551 (1837); *McGowan v. State*, 17 Tenn. 184 (1836).

3. As to problems that arise due to the introduction of a presumption, see McCORMICK, *EVIDENCE* §§ 306-22 (1954); 1 MORGAN, *BASIC PROBLEMS OF EVIDENCE* 30-41 (1957); 9 WIGMORE, *EVIDENCE* §§ 2490-93 (3d ed. 1940); McCormick, *Charges on Presumptions and Burden of Proof*, 5 N.C.L. REV. 291 (1927); Morgan, *Presumptions*, 10 RUTGERS L. REV. 512 (1956); Morgan, *Instructing the Jury upon Presumptions and Burden of Proof*, 47 HARV. L. REV. 59 (1933); Morgan, *Some Observations Concerning Presumptions*, 44 HARV. L. REV. 906 (1931); Annot., 103 A.L.R. 126 (1936). For an excellent note on presumptions in Tennessee, see 10 VAND. L. REV. 563 (1957).

4. In *McBaine, Burden of Proof: Degrees of Belief*, 32 CALIF. L. REV. 242 (1944) it is stated that the chief fault in the present system is that the language used to express the scope or extent of the burden of proof is not easily understood by the jury, which has the duty of deciding whether the burden has been sustained.

5. Wigmore feels there are three basic faults in the charges as given today: (1) the terms used are unsettled in meaning and ambiguous; (2) they tend to so many logical and verbal discriminations that they are impractical and unreal; and, (3) the jury in its brief moment of service cannot understand the many legal refinements of the charge. 9 WIGMORE, *EVIDENCE* § 2498(2) (3d ed. 1940). See also Morgan, *Presumptions*, 10 RUTGERS L. REV. 512 (1956). In Farley, *Instructions to Juries—Their Role in the Judicial Process*, 42 YALE L.J. 194 (1932), it is suggested that the only reason for the perpetuation of the charge in its present form seems to be that trial judges realize that the use of well-worn phrases will not usually be held erroneous by appellate courts.

6. For an interesting discussion, see Curtis, *Trial Judge and Jury*, 5 VAND. L. REV. 150 (1952).

understood are not readily found. There are ambiguities in the simplest of words and the most expressive are often the most confusing. However, realizing that the jury is completely untrained in the jargon of the legal profession, the minimum goal in framing a charge should be the use of words and phrases which give a sound statement of the law and depict the required degree of belief in the clearest manner possible.<sup>7</sup>

Several Tennessee cases have recognized a need for clearness and simplicity by indicating that an instruction must be within the comprehension of those uneducated in the law.<sup>8</sup> However, the courts have not always reflected this commendable attitude. Numerous cases hold that if an instruction is substantially correct it is sufficient, although not clear or explicit to the jury.<sup>9</sup> On the other hand, a charge "calculated to mislead" has been deemed reversible in clear cases of error.<sup>10</sup> Despite this, it is generally stated that no matter how meager or misleading, the charge will not cause reversal absent a special request in the trial court by the party adversely affected,<sup>11</sup> and, a

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7. "The common law system at this stage of its long and useful life should not be in an unsatisfactory state as to elementary questions. Can anyone, who has carefully read the decisions, say that the law as to the degree of belief required for fact finding in civil and criminal cases is in a satisfactory condition? We should no longer regard these matters as problems which we have not solved, although we may admit without apology that we have not been able to reach a satisfactory solution of many difficult questions of law." McBaine, *Burden of Proof: Degrees of Belief*, 32 CALIF. L. REV. 242, 244-45 (1944).

8. See *New York Life Ins. Co. v. Nashville Trust Co.*, 178 Tenn. 437, 159 S.W.2d 81 (1942) (additions should not be made which will lengthen charge without clarification); *Nashville, C. & St. L. Ry. v. Anderson*, 134 Tenn. 666, 185 S.W. 677 (1915) (error to read one party's pleadings as charge); *Good v. State*, 69 Tenn. 293 (1878) (jury should not be mystified by abstractions); *Glover v. Burke*, 23 Tenn. App. 350, 133 S.W.2d 611 (M.S. 1938) (charge should be plain and simple); *Herstein v. Kemker*, 19 Tenn. App. 681, 94 S.W.2d 76 (W.S. 1936) (charge must be plain and simple).

9. See *e.g.*, *Rose & Co. v. Snyder*, 185 Tenn. 499, 206 S.W.2d 897 (1947); *Southern Oil Works v. Bickford*, 82 Tenn. 651 (1885); *Hills v. Goodyear*, 72 Tenn. 233 (1880); *Dunlap, Moncure & Co. v. Babb*, 59 Tenn. 315 (1873); *Porter v. Campbell*, 61 Tenn. 81 (1872); *Trotter v. Watson*, 25 Tenn. 509 (1846); *Dorrity v. Mann*, 310 S.W.2d 191 (Tenn. App. W.S. 1957); *Burrow v. Lewis*, 24 Tenn. App. 253, 142 S.W.2d 758 (E.S. 1940); *Tinin v. Siner*, 9 Tenn. App. 252 (M.S. 1928); *Kenny Co. v. Williams*, 1 Tenn. App. 134 (W.S. 1925).

10. *Wilcox v. Hines*, 100 Tenn. 524, 45 S.W. 781 (1898); *East Tennessee, Va. & Ga. R.R. v. Gurley*, 80 Tenn. 46 (1883); *Somers v. Mississippi & Tenn. R.R.*, 75 Tenn. 201 (1881).

11. See *e.g.*, *McClard v. Reid*, 190 Tenn. 337, 229 S.W.2d 509 (1950); *Rose & Co. v. Snyder*, 185 Tenn. 499, 206 S.W.2d 897 (1947); *National Life & Acc. Ins. Co. v. Morrison*, 179 Tenn. 29, 162 S.W.2d 501 (1941); *Gentry v. Betty Lou Bakeries*, 171 Tenn. 20, 100 S.W.2d 230 (1936); *Citizen's St. Ry. v. Burke*, 98 Tenn. 650, 40 S.W. 1085 (1897); *Cumberland Tel. & Tel. Co. v. Poston*, 94 Tenn. 696, 30 S.W. 1040 (1895); *Maxwell v. Hill*, 89 Tenn. 584, 14 S.W. 486 (1891). However, other cases state that if the error goes to the merits of the case, the charge is reversible even without a special request. *Louisville & N. Ry. v. Martin*, 113 Tenn. 266, 87 S.W. 418 (1904); *Mariner v. Smith*, 66 Tenn. 423 (1874); *Weakley v. Pearce*, 52 Tenn. 401 (1871); *Dixon Stave & Heading Co. v. Archer*, 291 S.W.2d 603 (Tenn. App. E.S. 1956). See also *TENN.*

clearly erroneous charge is still non-reversible error unless prejudicial to the party alleging error.<sup>12</sup> It can be seen that it is impossible to predict what will be the reaction of the appellate court to an allegation that a particular charge is either erroneous or misleading.

It would seem that any charge which is inaccurate or unclear is always calculated to mislead and therefore, prejudicial. On the other hand, justice often requires affirmance of a verdict regardless of deficiencies in the charge. It is submitted that this is a dilemma which could be resolved by the use of a simple and understandable charge which would afford no basis for reversal on the grounds of unclarity, and which would aid the jury, lend predictability to the law and restrain unwarranted appellate court interference with the facts as found below.

Depending upon the issues involved, American courts generally recognize three different standards for determining when the burden of persuasion is met.<sup>13</sup> In the normal civil action, the jury is instructed that the existence or non-existence of a fact must be determined by a "preponderance of the evidence." This language is usually further explained by adding that the convincing force of the evidence, not its volume, is controlling.<sup>14</sup> In the exceptional civil case, where, as a mat-

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CODE ANN. §§ 27-116-17 (1955); CARUTHERS, HISTORY OF A LAWSUIT § 407 (7th ed., Gilreath 1951).

12. TENN. CODE ANN. §§ 27-116-17 (1955). See *Burrow v. Lewis*, 24 Tenn. App. 253, 142 S.W.2d 758 (E.S. 1940); *Grizzard & Cuzzort v. O'Neill*, 15 Tenn. App. 395 (M.S. 1932); *Stepp v. Black*, 14 Tenn. App. 153 (M.S. 1931).

13. Situations requiring different degrees of persuasion arise in everyday life. The need for varying degrees in lawsuits can best be analogized to such situations. See Morgan, *Presumptions*, 10 RUTGERS L. REV. 512 (1956).

However, the need for three different degrees of persuasion has not always been recognized by the courts. Before the nineteenth century, there seem to be no judicial references to varying standards of proof. Friedman, *Standards of Proof*, 33 CAN. B. REV. 665 (1955). It was recognized however that the trier of fact should be required to have a much stronger degree of belief before convicting in a criminal case; thus there came to be two standards of proof—the civil standard of preponderance of the evidence and the criminal standard of beyond a reasonable doubt. For an interesting discussion of the historical development of beyond reasonable doubt see May, *Some Rules of Evidence: Reasonable Doubt in Civil and Criminal Cases*, 10 AM. L. REV. 642 (1876). The next step was the development of a third standard to apply to those civil actions where experience had shown that a stronger degree of belief was needed as to claims inherently subject to fabrication, lapse of memory or the flexibility of conscience. This third standard as applied to civil actions has the effect of raising "the threshold at which evidence becomes of sufficient probative force to be submitted to the jury." Note, 60 HARV. L. REV. 111, 116 (1946). See also 3 POMEROY, EQUITY JURISPRUDENCE § 859a (5th ed. 1941); Comment, 32 CALIF. L. REV. 74 (1944).

14. For some of the explanations by appellate courts, see Annot., 93 A.L.R. 155 (1934). Frequently to aid the jury, the metaphor of a pair of scales is used and the evidence of one party is pictured as being placed in one pan and that of his adversary in the other. The pan holding the evidence of greater convincing force will, of course, tip the scales. Morgan feels that this metaphor makes clear that the convincing force of the evidence preponderates, regardless of its volume, but feels that this is likely to convey the erroneous idea that the party who has supplied evidence of greater convincing

ter of policy derived from experience, it is desirable that a heavier burden be imposed, the trier of fact is usually told that he must be persuaded by "clear and convincing evidence." In criminal cases, the fact finder is instructed to find "beyond a reasonable doubt." Do these phrases prescribe the requisite degree of belief in the clearest manner possible?<sup>15</sup>

A charge should direct the attention of the trier of fact to his own state of mind. That which emphasizes the evidence shifts the focus of attention to the means of producing belief rather than to belief itself.<sup>16</sup> "Preponderance of the evidence" and "clear and convincing evidence" refer to evidence and not to the required state of mind. Besides producing confusion, these standards may also result in error. For example, some evidence preponderates over, and must be of greater convincing force than no evidence. But it does not necessarily follow that the litigant who has produced some evidence and thus caused a hypothetical set of scales to tilt in his favor should prevail for he may not have persuaded the trier of fact to the requisite degree of belief.<sup>17</sup> Yet, under the typical charge is not the trier of fact who faithfully performs his duties obligated to find in accordance with the "preponderance of evidence," even though not persuaded? Assuming such faithfulness, would not the "preponderating" party have prevailed without carrying his burden of persuasion? Of course, as noted previously, under such a charge the jury is likely to ignore its duty and achieve the correct result intuitively.

Assuming that these charges could, by explanatory phrases, be so worded as to direct the jury properly, would this not be an involved and circuitous method of seeking a correct result? The attention and respect which a charge will receive seem directly proportional to its brevity and simplicity. A charge which attempts to do more than state the jury's task simply and lucidly will influence the jury in an inverse ratio to the degree of complexity, and the principle that the

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force has, by that fact alone, satisfied the burden of persuasion. Manifestly, this does not logically follow. Morgan, *Presumptions*, 10 RUTGERS L. REV. 512 (1956).

15. For an indication that they do not, see 11 U. CIN. L. REV. 119, 191 (1937) wherein a poll of former jurors as to which propositions of law were the most difficult for them to understand tallied as follows: preponderance of the evidence—232; proximate cause—203; reasonable doubt—136; negligence—110.

16. 1 MORGAN, BASIC PROBLEMS OF EVIDENCE 17-29 (1957); McBaine, *Burden of Proof: Degrees of Belief*, 32 CALIF. L. REV. 242 (1944); Morgan, *Presumptions*, 10 RUTGERS L. REV. 512 (1956); Morgan, *Instructing the Jury Upon Presumptions and Burden of Proof*, 47 HARV. L. REV. 59 (1933); Trickett, *Preponderance of Evidence and Reasonable Doubt*, 10 THE FORUM, Dickinson School of Law 76 (1906); Comment, 32 CALIF. L. REV. 74 (1944).

17. "It would be fatuous to affirm that a man ought to believe, even faintly, everything the evidence for which is, in his opinion, stronger than the evidence against it." Trickett, *Preponderance of Evidence and Reasonable Doubt*, 10 THE FORUM, Dickinson School of Law 76 (1906).

jury should and will respond to the charge is defeated. Would not the correct result be better insured by a simple and direct charge to the jury in the first instance?<sup>18</sup> Only the criminal charge properly places the emphasis on the desired state of mind of the finder of fact. It seems only when the phrase "beyond reasonable doubt" is subjected to complex explanations that it presents difficulties.

#### THE TENNESSEE CASES

##### *The Normal Civil Case*

Innumerable Tennessee cases have established the rule that in the normal civil action the burden of persuasion is satisfied by a "preponderance of the evidence."<sup>19</sup> Generally, it is said that this refers to the weight, credit and value of the aggregated testimony or evidence on either side,<sup>20</sup> or to the greater weight of evidence.<sup>21</sup> "Preponderance" does not mean a mere numerical superiority of witnesses.<sup>22</sup> Its meaning has often been illustrated by analogy to a pair of scales with the explanation that when more evidence is placed in one pan so as to tip the scale in that direction, a preponderance has been satisfied.<sup>23</sup> One opinion has stated that the term is so plain that an attempt to explain it is apt to lead to confusion, and that "the most common as well as the most critical mind can equally understand."<sup>24</sup> This certainly overestimates the capabilities of the most common, if not the most critical, mind<sup>25</sup> but correctly shows that attempts at explanation do lead to confusion. This difficulty, however,

18. Such a result would not be achieved by use of language found in the UNIFORM RULES OF EVIDENCE. Although intended to be remedial, one of the chief faults of these rules is the failure to define the phraseology advocated in readily understandable terms. Compare UNIFORM RULE OF EVIDENCE 1 (1953) with MODEL CODE OF EVIDENCE rule 1 (1942).

19. *Law v. Louisville & N. R.R.*, 179 Tenn. 687, 170 S.W.2d 360 (1943); *Pierce v. Pierce*, 174 Tenn. 508, 127 S.W.2d 791 (1939); *Knights of Pythias v. Steele*, 107 Tenn. 1, 63 S.W. 1126 (1901); *Gage v. Louisville, N.O. & T. R.R.*, 88 Tenn. 724, 14 S.W. 73 (1890); *Phillips v. Newport*, 28 Tenn. App. 187, 187 S.W.2d 975 (M.S. 1945).

20. See *e.g.*, *Wilcox v. Hines*, 100 Tenn. 524, 45 S.W. 781 (1898); *Hills v. Goodyear*, 72 Tenn. 233 (1880).

21. See *National Life & Acc. Ins. Co. v. Turner*, 159 Tenn. 130, 17 S.W.2d 13 (1928); *Benson v. Fowler*, 306 S.W.2d 49 (Tenn. App. W.S. 1957); *Frumin v. May*, 36 Tenn. App. 32, 251 S.W.2d 314 (E.S. 1952); *Ray v. Nanney*, 21 Tenn. App. 618, 114 S.W.2d 51 (W.S. 1937).

22. *Robertson v. State*, 189 Tenn. 42, 221 S.W.2d 535 (1949); *Christian v. State*, 184 Tenn. 163, 197 S.W.2d 797 (1946); *Wilcox v. Hines*, 100 Tenn. 524, 45 S.W. 781 (1898); *Ray v. Nanney*, 21 Tenn. App. 618, 114 S.W.2d 51 (W.S. 1937). But note that in the *Wilcox* case, *supra*, it was noted that the number of witnesses might be determinative.

23. See *e.g.*, *Pickard v. Berryman*, 24 Tenn. App. 263, 142 S.W.2d 764 (W.S. 1939); *Grizzard & Cuzzort v. O'Neill*, 15 Tenn. App. 395 (M.S. 1932). But see note 14, *supra*.

24. *Knights of Pythias v. Steele*, 108 Tenn. 624, 631, 69 S.W. 336, 337 (1902).

25. See note 15, *supra*.

is inherent in the phrase itself and the proper solution would seem to be a change in wording rather than attempts at explanation.

Dissatisfaction is reflected in the number of cases which, while nominally accepting this charge as depicting the correct measure of persuasion in the normal civil case, have modified, qualified, and added to it in attempts to further explain its meaning. An early Tennessee case, *Chapman v. McAdams*,<sup>26</sup> stated that any "slight preponderance" of evidence was sufficient. Not only does this wrongly focus attention on the evidence rather than the juror's mind, but it also requires a juror to find that a fact exists even though no belief whatsoever is generated as to the probable existence of such fact. Though the *Chapman* rule has been subjected to various interpretations,<sup>27</sup> it would appear that the use of the term "slight preponderance" is still permissible in Tennessee.<sup>28</sup>

Tennessee courts frequently use words which tend to call for a higher degree of certainty than is usually considered necessary in the normal civil case. For example, it is often said that to carry the burden of persuasion, it is necessary to "satisfy" the jury of the existence or non-existence of the facts in issue. Though "satisfy" is an ambiguous word, subject to varying connotations, it seems in many instances to impress upon the mind a requirement for more certainty than a "preponderance of evidence."<sup>29</sup> The Tennessee holdings as to the use of "satisfy" or derivatives thereof are inconsistent. Such phraseology has many times been approved,<sup>30</sup> but a leading case, *Knights of*

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26. 69 Tenn. 500 (1878).

27. The fallacies of the *Chapman* "slight preponderance" rule were first pointed out in the dissent of McFarland J., 69 Tenn. at 506. Still it was followed in *Hills v. Goodyear*, 72 Tenn. 233 (1880) but rejected in *Nashville Ry. & Light Co. v. Dungey*, 128 Tenn. 587, 163 S.W. 802 (1913) with a statement that McFarland's dissent was far more ineritorious and in fact had been subsequently followed by all Tennessee courts. However, the *Dungey* case itself was repudiated in *Blount County v. Perry*, 7 Tenn. App. 340 (E.S. 1928), the court stating that a mere or slight preponderance had been held sufficient in practically every case. The *Perry* view was reinforced by *Nashville, C. & St. L. Ry. v. Union Ry.*, 8 Tenn. App. 494 (W.S. 1928).

28. GIBSON'S SUITS IN CHANCERY § 453 (5th ed., Crownover 1955).

29. See 1 GREENLEAF, EVIDENCE § 2 (16th ed. 1899) (satisfactory evidence equivalent to beyond reasonable doubt). For discussion of judicial treatment of "satisfaction" or derivatives thereof in civil charges, see Annot., 147 A.L.R. 380 (1943).

30. *Gage v. Louisville, N.O. & T. R.R.*, 88 Tenn. 724, 14 S.W. 73 (1890); *Hills v. Goodyear*, 72 Tenn. 233 (1880); *Chapman v. McAdams*, 69 Tenn. 500 (1878); *Ridley's Adm'rs v. Ridley*, 41 Tenn. 323 (1860); *Hamilton v. Zimmerman*, 37 Tenn. (5 Sneed) 39 (1857); *Gifford v. Provident Life Ins. Co.*, 16 Tenn. App. 21, 64 S.W.2d 64 (M.S. 1932); *Harriman & N. R.R. v. McCartt*, 15 Tenn. App. 109 (E.S. 1932); *Nashville Ry. & Light Co. v. Harrison*, 5 Tenn. App. 22 (M.S. 1927). That this is especially so when so qualified as to make clear to the jury that the use of "satisfaction" or derivatives thereof does not require certainty beyond reasonable doubt as in criminal cases, see *Jones v. Mercer Pie Co.*, 187 Tenn. 322, 214 S.W.2d 46 (1948) (satisfy by a fair preponderance); *Provident Life & Acc. Ins. Co. v. Prieto*, 169 Tenn. 124, 83 S.W.2d



*Pythias v. Steele*, denounced its use and that of other carelessly drawn phrases in the following language:

The true statement of the rule is that if the evidence preponderate in favor of any contention of the plaintiff or defendant, that contention may by the jury be considered as sufficiently sustained to rest a verdict upon, and it is not necessary that the evidence should go so far as to make said contention clear and plain or establish it in a sense to make it free from doubt or uncertainty or set the minds of the jury at rest and convince them absolutely of the truth of the contention. After all the evidence that can be produced is introduced, the jury may still be unsatisfied—not convinced, their minds may not be at rest, they may not be freed from doubt, uncertainty and suspense, but still the jury may recognize that there is a preponderance of evidence, and on that they may base their verdict.<sup>31</sup>

This statement indicates that the use of words such as "satisfy" in the charge erroneously tends to call for an unnecessarily high degree of certainty. Some subsequent cases have indicated that if such phrases are properly qualified they will not be held erroneous,<sup>32</sup> while others have adhered more closely to *Knights of Pythias* and have held that the use of "satisfaction" is erroneous even though qualified.<sup>33</sup> Not only do qualifications tend to detract from the basic clearness and simplicity that a charge must have if it is to be of any value to the jury, but it is also felt that they cannot achieve their intended purpose of negating the higher degree of certainty invoked by the use of "satisfy."

If use of the word "satisfy" imposes too great a burden, then a requirement that a party be "convinced" should be equally erroneous. Although at one time approved,<sup>34</sup> this expression is now generally rejected in Tennessee.<sup>35</sup>

"Establish" means to make settled, definite or firm. To require that a fact be established in the minds of the jury before finding it to exist, would also seem to require a higher degree of belief than is normal in civil cases. Though approved by an early Tennessee case,<sup>36</sup> this view was subsequently rejected as requiring the jury to be satisfied of the

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251 (1935) (satisfy by a preponderance of the evidence); *Burrow v. Lewis*, 24 Tenn. App. 253, 142 S.W.2d 758 (E.S. 1940) (satisfy by a preponderance); *Standard Oil Co. v. Roach*, 19 Tenn. App. 661, 94 S.W.2d 63 (M.S. 1935) (satisfy by a fair preponderance).

31. 107 Tenn. 1, 10, 63 S.W. 1126, 1128 (1901).

32. *Gifford v. Provident Life Ins. Co.*, 16 Tenn. App. 21, 64 S.W.2d 64 (M.S. 1932); *Harriman & N. R.R. v. McCartt*, 15 Tenn. App. 109 (E.S. 1932).

33. *Nashville Ry. & Light Co. v. Dungey*, 128 Tenn. 587, 163 S.W. 802 (1913); *Fisher v. Traveler's Ins. Co.*, 124 Tenn. 450, 138 S.W. 316 (1911); *Stepp v. Black*, 14 Tenn. App. 153 (M.S. 1931).

34. *Ridley's Adm'rs v. Ridley*, 41 Tenn. 323 (1860).

35. See e.g., *Bryan v. Aetna Life Ins. Co.*, 174 Tenn. 602, 130 S.W.2d 85 (1939); *Knights of Pythias v. Steele*, 107 Tenn. 1, 63 S.W. 1126 (1901); *McBee v. Bowman*, 89 Tenn. 136, 14 S.W. 481 (1890).

36. *Hamilton v. Zimmerman*, 37 Tenn. (5 Sneed) 38 (1857).

truth of the fact.<sup>37</sup> However, the rule today seems to be that although the use of "establish" is abstractly improper, it is not reversible error if it is non-prejudicial or sufficiently qualified to show that only the normal civil standard is required.<sup>38</sup>

Sometimes the charge is so phrased as to indicate that the facts must be found to be true before a party will be entitled to a verdict. Since the aim of a lawsuit can never be the determination of absolute truth, such charges require an impossible measure of persuasion. For the most part, the *Knights of Pythias* view which treats such a charge as erroneous is accepted in Tennessee.<sup>39</sup>

A requirement that the facts be made "plain" or "clear and plain" to the juror's mind, or that the mind be made "free from doubt," also calls for more certainty than normally required, and has generally been recognized as erroneous in Tennessee.<sup>40</sup> However, two cases have indicated that it is not erroneous to require that a fact be "substantially proved."<sup>41</sup> Several have added the qualification that the fact must be proved by a "fair preponderance."<sup>42</sup> This is a useless qualification of an already confusing term, for just what is a *fair* preponderance?

The Tennessee opinions have been inconsistent as to the measure of persuasion required when circumstantial evidence is introduced. Several have indicated that in such cases more than the normal preponderance is required, and many have imposed standards equivalent to "beyond reasonable doubt." It has been stated that the circumstances must be such as usually or necessarily attend the essential facts.<sup>43</sup> Other opinions have maintained that a theory cannot be

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37. *Knights of Pythias v. Steele*, 107 Tenn. 1, 63 S.W. 1126 (1901).

38. See *Provident Life & Acc. Ins. Co. v. Prieto*, 169 Tenn. 124, 83 S.W.2d 251 (1935); *Fisher v. Traveler's Ins. Co.*, 124 Tenn. 450, 138 S.W. 316 (1911); *Grizzard & Cuzzort v. O'Neill*, 15 Tenn. App. 395 (M.S. 1932); *Stepp v. Black*, 14 Tenn. App. 153 (M.S. 1931); *Gannon v. Crichlow*, 13 Tenn. App. 281 (M.S. 1931). *But see* *Ballinger v. Connecticut Mut. Life Ins. Co.*, 167 Tenn. 367, 69 S.W.2d 1090 (1934); *Gifford v. Provident Life Ins. Co.*, 16 Tenn. App. 21, 64 S.W.2d 64 (M.S. 1932).

39. See *e.g.*, *Nashville Ry. & Light Co. v. Dungey*, 128 Tenn. 587, 163 S.W. 802 (1913); *Nashville Bridge Co. v. Hudgins*, 23 Tenn. App. 677, 137 S.W.2d 327 (M.S. 1938). *But see* *Stepp v. Black*, 14 Tenn. App. 153 (M.S. 1931); *East End Tire & Oil Co. v. Mallory*, 2 Tenn. App. 101 (W.S. 1925); *Kenny Co. v. Williams*, 1 Tenn. App. 134 (W.S. 1925).

40. See *Knights of Pythias v. Steele*, 107 Tenn. 1, 63 S.W. 1126 (1901).

41. *Nashville Ry. & Light Co. v. Dungey*, 128 Tenn. 587, 163 S.W. 802 (1913); *Glover v. Burke*, 23 Tenn. App. 350, 133 S.W.2d 611 (M.S. 1939).

42. *Jones v. Mercer Pie Co.*, 187 Tenn. 322, 214 S.W.2d 46 (1948); *Standard Oil Co. v. Roach*, 19 Tenn. App. 661, 94 S.W.2d 63 (M.S. 1935); *Gannon v. Crichlow*, 13 Tenn. App. 281 (M.S. 1931); *Nashville Ry. & Light Co. v. Harrison*, 5 Tenn. App. 22 (M.S. 1927).

43. See *Marquet v. Aetna Life Ins. Co.*, 128 Tenn. 213, 159 S.W. 733 (1913); *Dunlap v. State*, 126 Tenn. 450, 150 S.W. 86 (1912). In spite of later developments indicating that this phrase might not be adequate, it has recurred in recent decisions. See *Malone v. Robinson*, 35 Tenn. App. 320, 245 S.W.2d 628 (M.S. 1951); *Yearwood v. Louisville & N. R.R.*, 32 Tenn. App. 115, 222 S.W.2d 33 (M.S. 1949); *Havron v. Sequachee Valley Elec. Co-Op*, 30 Tenn. App. 234, 204 S.W.2d 823 (en banc 1947).

made out by circumstantial evidence unless the facts are consistent with such theory and absolutely inconsistent with any other rational theory;<sup>44</sup> or that the circumstantial evidence must so preponderate as to exclude "with reasonable certainty" other hypotheses,<sup>45</sup> or "every other reasonable hypothesis."<sup>46</sup> Other phrases have been used which also seem to have the effect of requiring more than a preponderance of the evidence where circumstantial evidence is involved.<sup>47</sup> However, in the case of *Bryan v. Aetna Life Ins. Co.*,<sup>48</sup> the Supreme Court of Tennessee, in addressing itself to this problem, stated:

The general rule is that it is sufficient in a civil case depending on circumstantial evidence, for the party having the burden of proof to make out the more probable hypothesis and the evidence need not arise to that degree of certainty which will exclude every other reasonable conclusion.<sup>49</sup>

The *Bryan* case has been generally cited in cases involving circumstantial evidence, but subsequent opinions generally substitute the phrase "preponderance of the evidence" for "more probable hypothesis."<sup>50</sup>

It is submitted that since use of the phrase "preponderance of the evidence" as depicting the measure of persuasion in the normal civil case places emphasis on the means of persuasion rather than on the effect of that persuasion on the mind of the finder of fact, and since the imposition of qualifications or modifications to this phrase tends only to confuse and mislead, this language should be replaced by more understandable terms. Further, there should be no distinction as to

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44. *Meador v. Nashville, C. & St. L. Ry.*, 177 Tenn. 273, 148 S.W.2d 371 (1941); *Standard Oil Co. v. Roach*, 19 Tenn. App. 661, 94 S.W.2d 63 (M.S. 1935); *Tennessee Elec. Power Co. v. Van Dodson*, 14 Tenn. App. 54 (M.S. 1931); *Crowe v. Birmingham & N.W. Ry.*, 2 Tenn. App. 634 (W.S. 1925).

45. *Life & Casualty Ins. Co. v. Robertson*, 6 Tenn. App. 43 (M.S. 1927); *Metropolitan Life Ins. Co. v. Staples*, 5 Tenn. App. 436 (E.S. 1927).

46. *Gannon v. Crichlow*, 13 Tenn. App. 281 (M.S. 1931).

47. See *Ballinger v. Connecticut Mut. Life Ins. Co.*, 167 Tenn. 367, 69 S.W.2d 1090 (1934); *Gifford v. Provident Life Ins. Co.*, 16 Tenn. App. 21, 64 S.W.2d 64 (M.S. 1932) (satisfy reasonable minds of the fact).

48. 174 Tenn. 602, 130 S.W.2d 85 (1939).

49. *Id.* at 610, 130 S.W.2d at 88.

50. *Law v. Louisville & N. R.R.*, 179 Tenn. 687, 170 S.W.2d 360 (1943); *New York Life Ins. Co. v. Nashville Trust Co.*, 178 Tenn. 437, 159 S.W.2d 81 (1942); *Burkett v. Johnston*, 39 Tenn. App. 276, 282 S.W.2d 647 (W.S. 1955); *Noe v. Talley*, 38 Tenn. App. 342, 274 S.W.2d 367 (E.S. 1954); *Kidd v. Tennessee Gas Co.*, 33 Tenn. App. 302, 231 S.W.2d 793 (E.S. 1950); *Yearwood v. Louisville & N. R.R.*, 32 Tenn. App. 115, 222 S.W.2d 33 (M.S. 1949); *McMahan v. Tucker*, 31 Tenn. App. 429, 216 S.W.2d 356 (W.S. 1948); *Good v. Tennessee Coach Co.*, 30 Tenn. App. 575, 209 S.W.2d 41 (M.S. 1947); *Everett v. Evans*, 30 Tenn. App. 450, 207 S.W.2d 350 (M.S. 1947); *Johnson v. Ely*, 30 Tenn. App. 294, 205 S.W.2d 759 (E.S. 1947); *Havron v. Sequachee Valley Elec. Co-Op*, 30 Tenn. App. 234, 204 S.W.2d 823 (en banc 1947); *Tennessee Central Ry. v. McCowan*, 28 Tenn. App. 225, 188 S.W.2d 931 (M.S. 1945); *Phillips v. Newport*, 28 Tenn. App. 187, 187 S.W.2d 965 (M.S. 1945); *Pickard v. Berryman*, 24 Tenn. App. 263, 142 S.W.2d 764 (W.S. 1939); *Gulf Refining Co. v. Frazier*, 19 Tenn. App. 76, 83 S.W.2d 285 (M.S. 1934).

measure of persuasion whether the facts be proven by direct or circumstantial evidence.

*The Unusual Civil Case*

In some civil cases a higher degree of belief is required before a fact can be found to exist. This requirement is imposed in cases where allegations of an unusual nature are introduced, such as charges of fraud, crime, or moral dereliction; attempts to vary or change a writing; or attempts to prove a lost instrument. In imposing this higher standard the court usually states that there must be "clear and convincing" evidence, or employs similar phraseology.

Whether the use of such language actually imposes a higher measure of persuasion and creates a middle ground between the normal civil and criminal cases has been questioned. Some Tennessee cases have stated that the phrase "clear and convincing" refers only to quality of proof and not quantity; therefore no more than a preponderance of this particular quality of evidence would be needed to sustain an allegation.<sup>51</sup> Notwithstanding such interpretations it seems obvious that the courts actually intend to require a higher degree of persuasion when this language is used in the charge, and such language would lead a trier of fact to feel that he must be persuaded to a higher degree of belief before finding a fact to exist or not to exist.

Not only has there been great variance in the language used in imposing this higher measure of persuasion, but, in many instances there has been disagreement as to whether a particular fact situation should be within this middle ground. This is not totally unexpected since the dividing line between the normal and the exceptional civil case is nebulous, resulting in a tendency to overlap at certain common points. Also, some Tennessee opinions seem still to be influenced by predilections to use the criminal standard of beyond reasonable doubt in any civil case where allegations of crime are in issue.<sup>52</sup> Tennessee cases wherein this higher measure of persuasion has been imposed will be analyzed as to the particular type of fact situation in which they arose.

*Insurer's Defense of Suicide to Action on a Life Policy:* In Tennessee, there is a presumption against suicide which is treated as evidence.<sup>53</sup> An insurer relying upon suicide as a defense must bear the burden of persuasion.<sup>54</sup> While some opinions have stated that this

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51. See *Ray v. Nanney*, 21 Tenn. App. 618, 114 S.W.2d 51 (W.S. 1937).

52. See *Groom, Proof of Crime in a Civil Proceeding*, 13 MINN. L. REV. 556 (1929).

53. *Bryan v. Aetna Life Ins. Co.*, 174 Tenn. 602, 130 S.W.2d 85 (1939); *Provident Life & Acc. Ins. Co. v. Prieto*, 169 Tenn. 124, 83 S.W.2d 251 (1935). See Note, 10 VAND. L. REV. 563 (1957).

54. See *Provident Life & Acc. Ins. Co. v. Prieto*, 169 Tenn. 124, 83 S.W.2d 251 (1953). While the court said that the defendant averring suicide had the

burden is sustained only by clear and convincing evidence, or an even higher measure of persuasion,<sup>55</sup> most Tennessee cases hold that it is sustained by evidence which preponderates over the opposing evidence, as reinforced by the presumption.<sup>56</sup>

Despite the use of the phrase "preponderance," which generally connotes a normal civil action, the courts in this situation seem desirous of imposing upon a party a greater burden of persuasion by virtue of the imposition of the presumption. Since such a higher degree of persuasion is required, this type of case seems to fall within the middle ground, whether placed there by the imposition of the presumption or the use of language normally associated therewith.

*Proving a Lost Instrument:* A measure of persuasion greater than that of the normal civil case is required to prove a lost instrument in order to avoid the potential danger arising from fraud and deception.<sup>57</sup> With several early exceptions<sup>58</sup> Tennessee opinions are uniform in holding that the measure of persuasion in such cases must be greater than in a normal civil case, but need not rise to that degree of certainty required for a criminal case. The language most often used to impose this standard is that the proof must be "strong, clear, and convincing," but this is not uniform.<sup>59</sup>

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burden of proof only in the secondary sense, it further said that this burden must be met by preponderance of the evidence, which clearly places the burden of persuasion on the defendant. See also *Nichols v. Mutual Life Ins. Co.*, 178 Tenn. 209, 156 S.W.2d 436 (1941); *Bryan v. Aetna Life Ins. Co.*, 174 Tenn. 602, 130 S.W.2d 85 (1939); *Knights of Pythias v. Steele*, 107 Tenn. 1, 63 S.W. 1126 (1901); *Mutual Benefit Health & Acc. Ass'n. v. Denton*, 22 Tenn. App. 495, 124 S.W.2d 278 (M.S. 1938); *Life & Casualty Ins. Co. v. Robertson*, 6 Tenn. App. 43 (M.S. 1927); *Metropolitan Life Ins. Co. v. Staples*, 5 Tenn. App. 436 (E.S. 1927); *Brown v. Sun Life Ins. Co.*, 57 S.W. 415 (Tenn. Ch. App. 1899).

55. *Fisher v. Traveler's Ins. Co.*, 124 Tenn. 450, 138 S.W. 316 (1911) (use of "establish" in charge unfortunate but not erroneous); *Life & Casualty Ins. Co. v. Robertson*, 6 Tenn. App. 43 (M.S. 1927) (evidence must so preponderate as to exclude with reasonable certainty any hypothesis of death by accident); *Metropolitan Life Ins. Co. v. Staples*, 5 Tenn. 436 (E.S. 1927) (exclude with reasonable certainty any hypothesis of death by accident or act of another).

56. See cases cited in footnote 54, *supra*.

57. See *McCarty v. Kyle*, 44 Tenn. 348 (1867); *Copeland v. Murphey*, 42 Tenn. 64 (1865); *Tisdale v. Tisdale*, 34 Tenn. 596 (1855); *Roysdon v. Terry*, 4 Tenn. App. 638 (M.S. 1927); *Johnson v. McKamey*, 53 S.W. 221 (Tenn. Ch. App. 1899).

58. See *e.g.*, *McCarty v. Kyle*, 44 Tenn. 348 (1867) (reasonable certainty); *Tisdale v. Tisdale*, 34 Tenn. 596 (1855) (evidence must leave no reasonable doubt).

59. See *Hunter v. Gardenhire*, 81 Tenn. 658 (1884) (clearest and most stringent evidence or satisfactory proof); *Morris v. Swaney*, 54 Tenn. 591 (1872) (clearly and fully satisfied); *Lamons v. Mathes*, 33 Tenn. App. 609, 232 S.W.2d 558 (E.S. 1950) (clear and convincing evidence); *Haven v. Wrinkle*, 29 Tenn. App. 195, 195 S.W.2d 787 (1945); *Hammer v. American United Life Ins. Co.*, 24 Tenn. App. 119, 141 S.W.2d 501 (E.S. 1940); *Roysdon v. Terry*, 4 Tenn. App. 638 (M.S. 1927) (strong, clear, cogent and conclusive evidence); *Wolfe v. Williams*, 1 Tenn. App. 441 (W.S. 1925) (clear, cogent and convincing evidence); *Asbury v. Hannum*, 8 Tenn. Civ. App. 146 (1917) (clear and satisfactory evidence); *Johnson v. McKamey*, 53 S.W. 221 (Tenn.

*Establishing Title by Adverse Possession:* To establish title by adverse possession in Tennessee, the party bearing the burden of persuasion must induce a higher degree of belief in the mind of the finder of fact. It is said in such cases that the evidence must be "clear and positive,"<sup>60</sup> "strong, clear and positive,"<sup>61</sup> "entirely satisfactory,"<sup>62</sup> "ample, clear and convincing"<sup>63</sup> or merely "clear and convincing."<sup>64</sup>

*Establishing a Gift Causa Mortis or Inter Vivos Against the Estate of a Deceased Donor:*

Gifts inter vivos, as well as gifts casua mortis, ought not to be sustained unless the evidence clearly and fully establishes every fact necessary to constitute a valid and completed gift. This is proper to the end that the rights of creditors may not be obstructed, that the donor may not be induced to the action involved in the gift by fraud or undue influence, and the result produced be an inequitable or unjust distribution of his estate, and that his weakness of body or mind may not be imposed on. In short, this class of gifts . . . are closely watched by courts, and they will not be sustained except upon clear and convincing evidence.

This excerpt from *Royston v. McCulley*<sup>65</sup> states the basic policy reason for imposing a higher measure of persuasion in such cases.

As to claims of gifts inter vivos, the majority of Tennessee cases have followed the rule of *Sheegog v. Perkins* in holding that the gift must be proved "absolutely and beyond a doubt. . . . [Every] doubt must prevail against the hypothesis of the gift."<sup>66</sup> Conceding that some higher standard is required, it is manifestly erroneous to impose a requirement of belief even greater than beyond reasonable doubt. Other cases have been less demanding.<sup>67</sup>

Ch. App. 1899) (very clear and cogent evidence). See generally, Annots., 41 A.L.R.2d 393 (1955); 3 A.L.R.2d 949 (1949); 148 A.L.R. 400 (1944); 126 A.L.R. 1139 (1940).

60. *Drewery v. Nelms*, 132 Tenn. 254, 177 S.W. 946 (1915); *Harrison v. Beatty*, 24 Tenn. App. 13, 137 S.W.2d 946 (M.S. 1939); *Mathis v. Campbell*, 22 Tenn. App. 40, 117 S.W.2d 764 (M.S. 1938); *Westmoreland v. Farmer*, 7 Tenn. App. 385 (M.S. 1928); *Beatty v. Owens*, 6 Tenn. App. 154 (M.S. 1927); *Zuccarello v. Erwin*, 2 Tenn. App. 491 (M.S. 1926).

61. *Coal & Iron Co. v. Coppinger*, 95 Tenn. (11 Pick.) 526, 32 S.W. 465 (1895).

62. *Mercy v. Miller*, 25 Tenn. App. 621, 166 S.W.2d 628 (M.S. 1942).

63. *Ibid.*

64. *Roysdon v. Terry*, 4 Tenn. App. 638 (M.S. 1927).

65. 59 S.W. 725, 733 (Tenn. Ch. App. 1900). See also *Atchley v. Rimmer*, 118 Tenn. 303, 255 S.W. 366 (1923).

66. 63 Tenn. 273, 281-82 (1874). See also *Pamplin v. Satterfield*, 196 Tenn. 297, 264 S.W.2d 886 (1953); *Chandler v. Roddy*, 163 Tenn. 338, 43 S.W.2d 397 (1931); *Williams v. Thornton*, 160 Tenn. 229, 22 S.W.2d 1041 (1930); *Shugart v. Shugart*, 111 Tenn. 179, 76 S.W. 821 (1903); *Balling v. Manhattan Sav. Bank & Trust*, 110 Tenn. 288, 75 S.W. 1051 (1903); *First Nat'l Bank v. Howard*, 302 S.W.2d 516 (Tenn. App. M.S. 1957); *American Nat'l Bank v. Robinson*, 27 Tenn. App. 644, 184 S.W.2d 393 (M.S. 1944); *O'Brien v. Waggoner*, 20 Tenn. App. 145, 96 S.W.2d 170 (M.S. 1936); *Ferry v. Bryant*, 19 Tenn. App. 612, 93 S.W.2d 344 (E.S. 1935).

67. See *Atchley v. Rimmer*, 148 Tenn. 303, 255 S.W. 366 (1923) (ample, clear and convincing); *Mercy v. Miller*, 25 Tenn. App. 621, 166 S.W.2d 628 (M.S. 1942) (ample, clear and convincing); *Nashville Trust Co. v. Williams*, 15

Gifts causa mortis also require this greater measure of persuasion, although often expressed in language decidedly different. Most cases state that the proof must be clear and convincing<sup>68</sup> with some using the phrase, "clear, convincing and unequivocal."<sup>69</sup>

*Allegations of Incapacity or Undue Influence in an Issue of Devisavit Vel Non.* Early Tennessee cases indicated that to sustain an allegation of incapacity, mental or physical, or a charge of undue influence on an issue of *devisavit vel non*; or, to establish a nuncupative will, more than the normal civil measure of persuasion was required. "Clearest and most satisfactory proof,"<sup>70</sup> "satisfactory evidence,"<sup>71</sup> "full and satisfactory evidence,"<sup>72</sup> "clear, cogent and convincing evidence"<sup>73</sup>—these phrases are typical of the language used to express the burden imposed.<sup>74</sup>

The landmark case of *Pierce v. Pierce*<sup>75</sup> determined that an allegation of insanity in an issue of *devisavit vel non* need not be sustained by the clearest and most satisfactory proof but that a preponderance of the evidence was sufficient if it overcame the opposing evidence when coupled with the presumption of sanity. This case has been generally followed.<sup>76</sup> Although it speaks in terms of "preponderance

Tenn. App. 445 (M.S. 1932) (full, clear and convincing); *Lenow v. Bank of Commerce & Trust Co.*, 4 Tenn. App. 218 (W.S. 1927) (clear, cogent and convincing); *Hesse v. Hamberger*, 39 S.W. 1063 (Tenn. Ch. App. 1896) (full and satisfactory proof).

68. *Wilson v. Wilson*, 151 Tenn. 486, 267 S.W. 364 (1924); *Scott v. Union & Planter's Bank & Trust Co.*, 123 Tenn. 258, 130 S.W. 757 (1910); *McAdoo v. Dickson*, 23 Tenn. App. 74, 126 S.W.2d 393 (W.S. 1938); *Royston v. McCulley*, 59 S.W. 725 (Tenn. Ch. App. 1900).

69. See e.g., *Gambill v. Hogan*, 30 Tenn. App. 465, 207 S.W.2d 356 (E.S. 1947).

70. *Porter v. Campbell*, 61 Tenn. 81 (1872) (insanity); *Gass' Heirs v. Gass' Ex'rs*, 22 Tenn. 278 (1842) (insanity); *Bank of Commerce & Trust Co. v. Stavros*, 20 Tenn. App. 662, 103 S.W.2d 593 (W.S. 1936) (mental incapacity); *Hager v. Hager*, 13 Tenn. App. 23 (M.S. 1930) (undue influence and mental incapacity).

71. *Maxwell v. Hill*, 89 Tenn. 584, 15 S.W. 253 (1891) (illiteracy); *Key v. Holloway*, 66 Tenn. 575 (1874) (insanity); *Watterson v. Watterson*, 38 Tenn. 1 (1858) (illiteracy); *Ford v. Ford*, 26 Tenn. 92 (1846) (insanity); *Miller v. Ford*, 1 Tenn. App. 618 (E.S. 1925) (nuncupative will).

72. *Wisener & Brown v. Maupin*, 61 Tenn. 342 (1872) (illiteracy); *Smith v. Thurman*, 49 Tenn. 110 (1870) (nuncupative will); *Crafton v. Harris*, 9 Tenn. App. 561 (M.S. 1929) (physical incapacity).

73. *Ray v. Nanney*, 21 Tenn. App. 618, 114 S.W.2d 51 (W.S. 1937) (nuncupative will).

74. One oft-cited case stated that the measure in such cases should be whatever was sufficient to convince the mind of an intelligent and unbiased jury of the truth of the fact. *Cox v. Cox*, 36 Tenn. (4 Sneed) 81 (1853). See also *Murray v. Garrison*, 306 S.W.2d 679 (Tenn. App. W.S. 1956). Other cases have made no reference whatever to the measure of persuasion. See *Purveyer v. Reese*, 46 Tenn. 21 (1868); *Pettitt's Ex'rs v. Pettitt*, 23 Tenn. (4 Humph.) 190 (1843).

75. 174 Tenn. 508, 127 S.W.2d 791 (1939).

76. See *Halle v. Summerfield*, 199 Tenn. 445, 287 S.W.2d 57 (1955); *Hammond v. Union Planter's Nat'l Bank*, 189 Tenn. 93, 222 S.W.2d 377 (1949); *Jones v. Sands*, 292 S.W.2d 492 (Tenn. App. W.S. 1953); *Cude v. Culbertson*, 30 Tenn. App. 628, 209 S.W.2d 506 (W.S. 1947).

of the evidence," *Pierce* can still be said to be within the middle ground, as were the suicide-insurer cases noted previously, for, by invoking a presumption of sanity or competency a burden of persuading the finder of fact to a higher degree of belief is placed upon the party alleging incompetency.<sup>77</sup>

*Establishing a Parol Trust or a Resulting Trust:* The judicial desire to protect the sanctity of written instruments from parol attack has resulted in a requirement of a higher measure of persuasion to establish a parol trust or a resulting trust. It has been stated that to establish a trust by parol evidence, the trust must be "clearly proved" or "clearly established,"<sup>78</sup> "proved with certainty,"<sup>79</sup> "proved beyond reasonable doubt,"<sup>80</sup> or established by evidence which is "clear," "cogent," "convincing," or "irrefragable."<sup>81</sup>

The language expressing the measure of persuasion necessary to establish a resulting trust is somewhat similar and just as stringent.<sup>82</sup>

*Reforming or Setting Aside a Written Instrument:* The desire to protect the sanctity of written instruments becomes even more apparent when one litigant seeks to reform or set aside such an instrument. Although some cases have indicated that the burden of per-

77. See generally Morgan, *Burden of Proof and Presumptions in Will Contests in Tennessee*, 5 VAND. L. REV. 74 (1951).

78. *Brunson v. Gladish*, 174 Tenn. 309, 125 S.W.2d 144 (1938); *Harris v. Union Bank*, 41 Tenn. 152 (1860); *Pritchard v. Wallace*, 36 Tenn. (4 Sneed) 405 (1857).

79. *Hardison v. Billington*, 82 Tenn. 346 (1884).

80. *Guntert v. Guntert*, 37 S.W. 890 (Tenn. Ch. App. 1896).

81. *Hunt v. Hunt*, 169 Tenn. 1, 80 S.W.2d 666 (1934) (clear and convincing); *Stone v. Manning*, 103 Tenn. 232, 52 S.W. 990 (1899) (clear, cogent and convincing); *Seaton v. Dye*, 37 Tenn. App. 323, 263 S.W.2d 544 (E.S. 1953) (clear, cogent, convincing and irrefragable); *Hoffner v. Hoffner*, 32 Tenn. App. 98, 221 S.W.2d 907 (E.S. 1949) (clear, cogent and convincing); *Pearson v. McCallum*, 26 Tenn. App. 413, 173 S.W.2d 150 (W.S. 1941) (clear, cogent and convincing); *Savage v. Savage*, 4 Tenn. App. 277 (M.S. 1927) (clear, cogent and convincing).

82. Clear and satisfactory: *Gaugh v. Henderson*, 39 Tenn. 628 (1859); *Haywood v. Ensley*, 27 Tenn. 460 (1847); *Shoun v. Gentry*, 2 Tenn. App. 55 (E.S. 1925). Clearest and most convincing: *Pheonix F. & M. Ins. Co. v. Shoemaker*, 95 Tenn. 72, 31 S.W. 370 (1895); *Allen v. Goldstein*, 291 S.W.2d 596 (Tenn. App. W.S. 1956); *Caprum v. Bransford Realty Co.*, 4 Tenn. App. 237 (M.S. 1927). Clearly established or clearly shown: *Dudley v. Bosworth*, 29 Tenn. 9 (1848); *Devises & Ex'rs of Robertson v. Maclin*, 4 Tenn. (3 Hay.) 70 (1816). Clear and convincing evidence: *Nashville Trust Co. v. Lannom's Heirs*, 36 S.W. 977 (Tenn. Ch. App. 1896). Clear and unequivocal evidence: *Greenwood v. Maxey*, 190 Tenn. 599, 231 S.W.2d 315 (1950); *Shoemaker v. Smith*, 30 Tenn. (11 Humph.) 81 (1850); *Greene v. Greene*, 38 Tenn. App. 238, 272 S.W.2d 483 (M.S. 1954). Most convincing and irrefragable evidence: *Hyden v. Hyden*, 65 Tenn. 406 (1873); *Holder v. Nunnally*, 42 Tenn. 288 (1865); *McCammon v. Pettitt*, 35 Tenn. (3 Sneed) 242 (1855); *Burnett v. Campbell County*, 1 Tenn. Ch. App. 18 (1901). Proved clearly and satisfactorily: *Sandford v. Weeden*, 49 Tenn. 71 (1870). Clear, convincing and irrefragable evidence: *Hall v. Fowlkes*, 56 Tenn. (9 Heisk.) 745 (1872). Most satisfactory and convincing evidence: *Pillow v. Thomas*, 60 Tenn. 120 (1873). Shown with great clearness and certainty: *Sullivan v. Sullivan*, 86 Tenn. 376, 65 S.W. 876 (1888); *Wells v. Stratton*, 1 Tenn. Ch. 328 (1873). Established beyond doubt: *Walker v.*



suasion is met by a preponderance of the evidence, an examination of these opinions shows that they refer to a preponderance over the opposing evidence as reinforced by a presumption in favor of the written instrument.<sup>83</sup> As has been noted this is but a circuitous means of requiring a higher degree of belief. To show that a deed absolute on its face is intended as a mortgage, it is generally stated that the evidence must be "clear, decisive and without doubt,"<sup>84</sup> "exceedingly clear and satisfactory,"<sup>85</sup> "cogent and clear,"<sup>86</sup> or "clearly established beyond reasonable controversy."<sup>87</sup> To reform or set aside a written contract or deed, the Tennessee cases have used language substantially similar to that above in describing the degree of belief.<sup>88</sup>

*Allegations of Fraud, Crime or Moral Dereliction:* At one time there was much judicial disagreement as to the measure of persuasion neces-

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Walker, 2 Tenn. App. 279 (M.S. 1925). Clear, cogent and convincing evidence: Warner v. Maroney, 16 Tenn. App. 78, 66 S.W.2d 244 (E.S. 1932); Tennessee-Carolina Mills v. Mauk, 14 Tenn. App. 517 (E.S. 1931).

83. See Stone v. Manning, 103 Tenn. 232, 234-35, 52 S.W. 990 (1899); Bennett v. Massachusetts Mut. Life Ins. Co., 107 Tenn. 371, 64 S.W. 759 (1901).

84. Lewis v. Bayliss, 90 Tenn. 280, 16 S.W. 376 (1891) (no reasonable doubt); Lane v. Dickerson, 18 Tenn. 373 (1837).

85. Loyd v. Currin, 22 Tenn. 462 (1842).

86. Haynes v. Swann, 53 Tenn. 560 (1871); Nickson v. Toney, 40 Tenn. (3 Head) 655 (1859).

87. Battle v. Claiborne, 133 Tenn. 286, 180 S.W. 584 (1915).

88. Clear and strong, to the entire satisfaction of the court: Perry v. Pearson, 20 Tenn. (1 Humph.) 431 (1839). Clear, certain and satisfactory: Johnson v. Johnson, 67 Tenn. 261 (1874); Bailey v. Bailey, 27 Tenn. 230 (1847); Sands v. Hickman, 3 Tenn. Civ. App. 280 (1912). Entirely clear and satisfactory: Alexander v. Shapard, 146 Tenn. 90, 240 S.W. 287 (1921); Talley v. Courtney, 48 Tenn. 715 (1870); Cromwell v. Winchester, 39 Tenn. 389 (1859); Barnes v. Gregory, 38 Tenn. (1 Head) 230 (1858); Davidson v. Greer, 35 Tenn. (3 Sneed) 383 (1855); First Nat'l Bank v. Ashby, 2 Tenn. App. 666 (M.S. 1925); Townsend v. Cocke, 1 Shan. Tenn. Cas. 95 (1858). Beyond reasonable controversy: Croinwell v. Winchester, 39 Tenn. 389 (1859); Davidson v. Greer, 35 Tenn. (3 Sneed) 383 (1855); Myrick v. Johnson, 25 Tenn. App. 483, 160 S.W.2d 185 (M.S. 1941); Mayberry v. Nichol, 39 S.W. 881 (Tenn. Ch. App. 1896). Clearest and most satisfactory proof: Wry v. Cutler, 59 Tenn. 28 (1873). Full and satisfactory proof: McClelland v. Payne, 84 Tenn. 709 (1886). Clear, exact, satisfactory and conclusive: Rodgers v. Smith, 48 S.W. 700 (Tenn. Ch. App. 1898). Clear, satisfactory, convincing and conclusive: Kyle v. Kyle, 18 Tenn. App. 200, 74 S.W.2d 1065 (E.S. 1934). Clearest and most convincing: Kennedy v. Security Bldg. & Sav. Ass'n., 57 S.W. 388 (Tenn. Ch. App. 1900). Practically beyond reasonable doubt: Clack v. Hadley, 64 S.W. 403 (Tenn. Ch. App. 1901). Clear and unmistakable: Cauchron v. Stirespring, 132 Tenn. 636, 179 S.W. 152 (1915). Clearly proven: Young v. Weakley, 144 Tenn. 360, 232 S.W. 949 (1920). Clear and convincing: Hazzlett v. Bryant, 192 Tenn. 251, 241 S.W.2d 121 (1950); Jones v. Jones, 150 Tenn. 554, 266 S.W. 110 (1924); Commercial Standard Ins. Co. v. Paul, 35 Tenn. App. 394, 245 S.W.2d 775 (E.S. 1951); Napier v. Stone, 21 Tenn. App. 626, 114 S.W.2d 57 (M.S. 1937). Clear, strong, unequivocal, unmistakable and beyond a doubt: Walker v. Walker, 2 Tenn. App. 279 (M.S. 1925). Clear, cogent, convincing and irrefragable: Anderson v. Howard, 18 Tenn. App. 169, 74 S.W.2d 387 (E.S. 1934); City of Lawrenceburg v. Maryland Cas. Co., 16 Tenn. App. 238, 64 S.W.2d 69 (M.S. 1933). Clearly made out: Henderson v. Henderson, 159 Tenn. 126, 17 S.W.2d 15 (1928). Clearly established: Greer v. Ferguson Grocery Co., 168 Tenn. 242, 77 S.W.2d 443 (1935). Established beyond controversy: Wry v. Cutler, 59 Tenn. 28 (1873). Clear, cogent and convincing: Marron v. Scarbrough, 314 S.W.2d 165 (Tenn. App. W.S. 1958).

sary to sustain an allegation of crime, fraud or moral dereliction in a civil proceeding. This arose from the fear that allowing allegations essentially criminal in nature to be proved by the normal civil measure would deprive defendant of criminal procedural safeguards. The earlier English rule required that the criminal standard be applied in such cases.<sup>89</sup> However, the great majority of American jurisdictions now hold that such allegations do not have to be proved beyond reasonable doubt.<sup>90</sup>

*Coulter v. Stuart*,<sup>91</sup> an 1828 Tennessee case involving an allegation of perjury in a civil action of slander, indicated by way of dictum that the quantum of proof necessary to sustain such a charge was the same as that necessary in a criminal action. Subsequent cases<sup>92</sup> recognizing the *Coulter* dictum to be an exception to the general rule held that only a preponderance of the evidence was needed, but it must be such as to outweigh the opposing evidence plus the presumption of innocence.<sup>93</sup> *Lay v. Linke*,<sup>94</sup> removed any doubt as to the effect of *Coulter* by pointing out that the criminal standard was not required in Tennessee civil cases and that only a preponderance is necessary. In *McBee v. Bowman*, the Supreme Court of Tennessee explained the rule thus:

The amount of evidence . . . [to sustain such a charge] must be greater than in the ordinary civil case, because he [the party so charged] . . . has placed more weight on his side of the scales; but the required degree of preponderance is the same. The degree of conviction in the minds of the jury may be the same where there is a charge of crime in a civil case as where there is no such charge, though more evidence is necessary to overcome opposing testimony and produce that conviction in the one case than in the other. A preponderance in either case is sufficient.<sup>95</sup>

It is apparent that *McBee*, in requiring a preponderance over both evidence and presumption, is actually requiring a higher degree of certainty in this type of civil case; and this seems proper. Allegations

89. See Groom, *Proof of Crime in a Civil Proceeding*, 13 MINN. L. REV. 556 (1929). See also 9 WIGMORE, EVIDENCE § 2498(2) (3d ed. 1940).

90. See Annots., 124 A.L.R. 1378 (1940); 62 A.L.R. 1449 (1929).

91. 10 Tenn. (2 Yerg.) 225 (1828).

92. *Fleming v. Wallace*, 116 Tenn. 20, 91 S.W. 47 (1905); *McBee v. Bowman*, 89 Tenn. 132, 14 S.W. 481 (1890); *Hills v. Goodyear*, 72 Tenn. 233 (1880).

93. *Bennett v. Massachusetts Mut. Life Ins. Co.*, 107 Tenn. 371, 64 S.W. 759 (1901) (fraud); *City of Sparta v. Lewis*, 91 Tenn. 370, 23 S.W. 182 (1892) (action by municipality to recover penalty for violation of ordinance for which there could also be criminal prosecution); *Keys v. Keys*, 23 Tenn. App. 188, 129 S.W.2d 1103 (E.S. 1939) (forgery of will); *Fly v. Woods*, 13 Tenn. App. 310 (W.S. 1931) (fraud); *Livingston v. United States Fire Ins. Co.*, 7 Tenn. App. 230 (M.S. 1928) (fraud); *Independent Life Ins. Co. v. Knight*, 2 Tenn. App. 259 (W.S. 1926) (fraud). See also GIBSON'S SUITS IN CHANCERY § 453 (5th ed., Crownover 1955); Note, 10 VAND. L. REV. 563 (1957).

94. 122 Tenn. 433, 123 S.W. 746 (1909).

95. 89 Tenn. 132, 140, 14 S.W. 481, 483 (1890).

of this nature are of such gravity that if a comparable situation arose in everyday life, an impartial person confronted with the necessity of making a decision would demand of himself a greater degree of certainty. No less can be demanded in a lawsuit. But it is submitted that the Tennessee courts are in error in feeling that this higher requirement is conveyed to the mind of the fact finder by the language of *McBee*. Looking strictly to the effect that language has on the mind, it is difficult to see how the mere statement that a presumption is to be considered as evidence can have any convincing power at all. If the present practice of mentioning the presumption and charging in terms of evidence must be followed, it would seem that to properly impress upon the mind of the jury that the more stringent measure is required, he should be told that this presumption must be overcome by more than a preponderance of the evidence, or, in the vernacular now in general use, that it must be overcome by clear and convincing evidence.

Of course, the best solution in this as in other cases requiring a higher measure of persuasion would be to abandon the use of such language entirely since it wrongly focuses attention upon the evidence rather than upon a state of mind, and tends to confuse the fact finder. Further, it might be asked how can any evidence which is not clear be convincing, and how can any evidence which is not convincing be the basis of a verdict?<sup>96</sup>

#### *The Criminal Case*

Although the method of proving particular facts is substantially the same in both civil and criminal cases,<sup>97</sup> it is not at all surprising that a much greater degree of certainty is required when the liberty or life of a person is at stake, rather than merely his fortune. Consequently, it is well accepted in Tennessee that in order to convict one criminally accused all elements of the offense must be proved beyond reasonable doubt.<sup>98</sup>

Of the three charges as to measure of persuasion now in general

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96. See Morgan, *Presumptions*, 10 *RUTGERS L. REV.* 512 (1956).

97. *TENN. CODE ANN.* § 40-2401 (1955).

98. *Chadwick v. State*, 189 Tenn. 256, 225 S.W.2d 52 (1949); *Foster v. State*, 180 Tenn. 164, 172 S.W.2d 1003 (1943); *Caldwell v. State*, 164 Tenn. 325, 48 S.W.2d 1087 (1931); *Smith v. State*, 159 Tenn. 674, 21 S.W.2d 400 (1929); *Moon v. State*, 146 Tenn. 319, 242 S.W. 39 (1921); *Odeneal v. State*, 128 Tenn. 60, 157 S.W. 419 (1913); *Jordan v. State*, 124 Tenn. 81, 135 S.W. 327 (1910); *Frazier v. State*, 117 Tenn. 430, 100 S.W. 94 (1906); *State v. Moss*, 106 Tenn. 359, 61 S.W. 87 (1901); *King v. State*, 91 Tenn. 617, 20 S.W. 169 (1892); *Owen v. State*, 89 Tenn. 698, 16 S.W. 114 (1891); *Barnards v. State*, 88 Tenn. 183, 12 S.W. 431 (1889); *Rea v. State*, 76 Tenn. 356 (1881); *Lawless v. State*, 72 Tenn. 173 (1879); *Butler v. State*, 66 Tenn. 35 (1872); *Poole & Mahaffey v. State*, 61 Tenn. 288 (1872); *Dove v. State*, 50 Tenn. 348 (1872); *Purkey v. State*, 50 Tenn. 26 (1870); *Phipps v. State*, 43 Tenn. 344 (1866).

use the criminal charge is by far the most meaningful to the average juror. As the Supreme Court of Tennessee has said, "we question whether, if the judge had attempted an explanation [of reasonable doubt], he could have given a definition more easily comprehended by the jury . . ."99 Nevertheless, Tennessee judges have at times attempted to explain "reasonable doubt," with varying degrees of success. Defining it as "an inability . . . to let the mind rest easily upon the certainty of guilt or innocence" was approved in *Rea v. State*,<sup>100</sup> but held to be reversible error in *State v. Moss*<sup>101</sup> because it implied that the mind of the finder of fact should rest easily on the certainty of the defendant's innocence before he could be acquitted. A definition of reasonable doubt as that which "leaves your minds in that condition that you do not feel an abiding conviction to a moral certainty of the truth of the charge" has been upheld.<sup>102</sup> It is submitted that such explanations tend to complicate what is otherwise a relatively self-explanatory charge. Their effect on the mind of the finder of fact is likely to be confusion, or increased incomprehension, rather than enlightenment.

The terminology "beyond reasonable doubt" has not always met with approval in Tennessee, as witness the language of Chief Justice Catron in classifying the phrase as

[A]n awkward and vague expression, calculated to cover but too often the corrupt verdict of a juror packed on the state by the defendant, and what is almost as bad, calculated to ease the conscience of an honest but weak hearted juror, who is convinced of the guilt of the defendant, yet is willing to violate his oath to quiet his sympathy.

The chief justice then goes on to expound what he believes to be the correct charge in criminal cases:

It is hoped it [beyond reasonable doubt] will be dropped by the circuit courts, and the juries in its stead be told, that from all the evidence taken together, and taken in connexion [sic] with the law as laid down by the court, the jury must be honestly, and fairly, and impartially convinced, that the defendant is guilty as charged in the indictment, before they can give a verdict of guilty.<sup>103</sup>

With all due deference to the learned chief justice, it may be questioned just how this charge will eliminate the problem caused by the "packed" or "weak hearted juror." Rather, will not the requirement of being convinced seem to the fair minded and impartial jurors to demand absolute certainty? Could such a juror conscientiously convict under such a charge if even a possible doubt remained?

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99. *Butler v. State*, 66 Tenn. 35, 37 (1872).

100. 76 Tenn. 356 (1881).

101. 106 Tenn. 359, 61 S.W. 87 (1901).

102. See *Odeneal v. State*, 128 Tenn. 60, 63, 157 S.W. 419, 420 (1913).

103. *Coffee v. State*, 11 Tenn. 283, 286 (1832).

While opposition to the use of "beyond reasonable doubt" is not usually so pronounced, it is reflected in many cases by the substitution of other phraseology. When this occurs, it becomes necessary for the appellate court to determine if such substitute phraseology imports an equivalent meaning.

A charge that the proof must be "to your satisfaction" or "must satisfy you" has been held to be reversible error,<sup>104</sup> but other charges in terms of "full satisfaction" or "leaving the mind at rest" have been upheld in the absence of a special request for a further charge,<sup>105</sup> even though many cases hold that the trial judge has a duty to charge in terms of reasonable doubt without any request.<sup>106</sup> The appellate courts themselves have suggested the use of "full conviction" as the substantial equivalent of beyond reasonable doubt.<sup>107</sup>

It is difficult to see how requirements of satisfaction or conviction add to the enlightenment of the jury, and perhaps the most that can be said in favor of leaving the mind at rest is that while it does not contribute to the jury's enlightenment, at least it will not increase its incomprehension. Further, a charge calling for conviction or satisfaction can easily be interpreted as calling for absolute truth and should be avoided for this reason.

If the guilt of the defendant depends wholly upon circumstantial evidence, failure to charge with reference to such evidence is fundamental and reversible error, even though no request is tendered;<sup>108</sup> and, giving the charge as to reasonable doubt does not supersede the necessity of charging that in order to authorize a conviction upon circumstantial evidence, the circumstances must be such as to exclude every reasonable hypothesis other than the defendant's guilt.<sup>109</sup>

Although this concern with the probative value of circumstantial evidence is found in a number of jurisdictions besides Tennessee,<sup>110</sup> there seems to be no valid reason for the perpetuation of such a rule

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104. See *Fisher v. State*, 117 Tenn. 430, 100 S.W. 94 (1906); *Owen v. State*, 89 Tenn. 698, 16 S.W. 114 (1891).

105. See *Dietzel v. State*, 132 Tenn. 47, 177 S.W. 47 (1915); *Barnards v. State*, 88 Tenn. 183, 12 S.W. 431 (1889); *Turner v. State*, 72 Tenn. 206 (1879); *Lawless v. State*, 72 Tenn. 173 (1879); *Purkey v. State*, 50 Tenn. 26 (1870).

106. See *e.g.*, *Frazier v. State*, 117 Tenn. 430, 100 S.W. 94 (1906).

107. See *Dove v. State*, 50 Tenn. 348 (1872); *Coffee v. State*, 11 Tenn. 283 (1832).

108. See *Bishop v. State*, 199 Tenn. 428, 287 S.W.2d 49 (1956); *Green v. State*, 154 Tenn. 26, 285 S.W. 554 (1926); *Webb v. State*, 140 Tenn. 205, 203 S.W. 955 (1918); *Turner v. State*, 72 Tenn. 206 (1879).

109. *Stinson v. State*, 181 Tenn. 172, 180 S.W.2d 883 (1944); *Dietzel v. State*, 132 Tenn. 47, 177 S.W. 47 (1915); *Barnards v. State*, 88 Tenn. 183, 12 S.W. 431 (1889); *Rea v. State*, 76 Tenn. 356 (1881); *Nelson v. State*, 32 Tenn. (2 Swan) 237 (1852); *Smith v. State*, 2 Tenn. Leg. Rep. 56 (1878). That such charge need not be made when direct evidence is also introduced, see *Smith v. State*, 159 Tenn. 674, 21 S.W.2d 400 (1929) and *Moon v. State*, 146 Tenn. 319, 242 S.W. 39 (1921).

110. See Annot., 15 A.L.R. 1049 (1921).

other than an inherent distrust of circumstantial evidence. A correct charge as to reasonable doubt alone seems fully to protect the defendant and the addition to the charge required when circumstantial evidence is in issue is redundant and unnecessary.

It is well established that beyond reasonable doubt is the degree of belief necessary as to every element of the offense.<sup>111</sup> However, this same degree of certainty is not necessary as to other aspects of the proceedings. For instance, affirmance by the appellate court after conviction requires only a preponderance of the evidence, since at that point guilt is said to be presumed;<sup>112</sup> the issue of venue is only jurisdictional and may be established by a preponderance of the evidence;<sup>113</sup> and present (at time of trial) insanity has no bearing on guilt or innocence and requires only a preponderance.<sup>114</sup> Of course the defendant need not prove beyond reasonable doubt a defense introduced to negate an essential element of the state's case and it is error for the judge to so charge.<sup>115</sup>

The jury in a Tennessee criminal case is both the finder of fact and the judge of the law.<sup>116</sup> To aid the jury in this task, the Tennessee Code provides that in all felony cases the charge must be completely written down, read to the jury, and then sent out with them upon their retirement.<sup>117</sup> The worth of such a provision is totally obviated if the charge is so worded as to be incapable of comprehension. That part of the charge dealing with the measure of persuasion especially must be lucidly expressed, since it is there that the jury is most apt to become confused.<sup>118</sup> When correctly used without modifications or qualifications that tend to confuse and obscure the true meaning, the phrase "beyond reasonable doubt" is an understandable expression of the measure of persuasion required in criminal cases. However, to better effect a uniform system of instructions, it is suggested that

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111. See *Jordan v. State*, 124 Tenn. 81, 135 S.W. 327 (1910); *Frazier v. State*, 117 Tenn. 430, 100 S.W. 94 (1906); *Owen v. State*, 89 Tenn. 698, 16 S.W. 114 (1891); *Dove v. State*, 50 Tenn. 348 (1872).

112. See *e.g.*, *Cathey v. State*, 191 Tenn. 617, 235 S.W.2d 601 (1950); *Gang v. State*, 191 Tenn. 468, 234 S.W.2d 997 (1950); *Robertson v. State*, 189 Tenn. 42, 221 S.W.2d 535 (1949).

113. See *e.g.*, *Reynolds v. State*, 199 Tenn. 349, 287 S.W.2d 15 (1956).

114. See *e.g.*, *Jordan v. State*, 124 Tenn. 81, 135 S.W. 327 (1910).

115. *Legere v. State*, 111 Tenn. 368, 77 S.W. 1059 (1903) (alibi); *Hamilton v. State*, 97 Tenn. 452, 37 S.W. 194 (1896) (self-defense); *King v. State*, 91 Tenn. 617, 20 S.W. 169 (1892) (insanity); *Wiley v. State*, 64 Tenn. 662 (1875) (alibi); *Dove v. State*, 50 Tenn. 348 (1872) (insanity); *Chappel v. State*, 47 Tenn. 92 (1869). See also Annot., 29 A.L.R. 1127 (1924) on alibi as a defense. *But see*, *Odeneal v. State*, 128 Tenn. 60, 157 S.W. 419 (1913) (alibi must be clearly and fully established).

116. TENN. CONST. art. 6, § 9. See *Dykes v. State*, 296 S.W.2d 861 (Tenn. 1956); *Ford v. State*, 101 Tenn. 454, 47 S.W. 703 (1898).

117. TENN. CODE ANN. § 40-2516 (1955).

118. See note 15, *supra*.

alterations be made so as to cause the criminal charge to conform more closely to a correct statement of the civil charges.

#### CONCLUSION

The preceding discussion emphasizes the need for, and the value of, clear and understandable instructions.

The instruction is the means by which the body of the law is kept intact; the means by which each man subject to trial is assured that on an equal basis with all other men his rights will have applied to them the principles forged out of centuries of legal development and found just. Without the instruction no check rein would exist on the jury and every verdict would be based on the layman juror's conclusion as to what the law should be—or trial by mob. The time-tried formula for rendering justice would be replaced by the layman's thirty minute conclusion as to what the law, as influenced by his personal passion, prejudice and sympathy ought to be.

The instruction is the only way, in jury trials, in which the rules of law can be applied to the facts—it furnishes the tie that binds the particular facts in evidence irrevocably to the particular rule applicable. Without this tie, ten companion cases would be subjected to ten different legal interpretations by ten different juries.<sup>119</sup>

But no instruction can properly serve its function unless it is clear and understandable. It has been demonstrated that the present Tennessee instructions as to measure of persuasion are not clear and understandable thus giving rise to the necessity of employing other expressions.

It is submitted that only an instruction phrased in terms of probabilities can be clear, understandable and accurate. This does not mean that absolute truth is not the desired goal of a lawsuit but rather is a pragmatic realization that such can never be attained under an adversary system of litigation. Therefore, when the evidence in a particular case requires that a finding of fact be based upon that measure of persuasion now termed a preponderance of the evidence, it is recommended that the instructions should advise that the fact be found to exist for the purposes of the lawsuit if its existence is more probable than its non-existence. In the unusual civil case where the measure of persuasion is now expressed as clear and convincing evidence, a fact should be found to exist if its existence is much more probable or more highly probable than its non-existence. In a criminal case, the instruction now given, beyond reasonable doubt, correctly places emphasis upon the mental processes of the finder of fact and does seem to evoke the requisite degree of belief. In the interest of uniformity, however, this instruction could more properly be phrased "probability

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<sup>119</sup> Trusty, *The Value of Clear Instructions*, 15 KANS. CY. L. REV. 9, 10 (1946).

beyond a reasonable doubt, but not beyond a possible doubt." It can be seen that by expressing the measure of persuasion in any case in terms of probabilities the standard will be more understandable to the layman since his own everyday decision making processes are in terms of probabilities. Further, in this manner, increasing degrees of persuasion demanded in different types of cases are more vividly depicted while at the same time uniformity is gained throughout each of the standards. Finally and most important, by such phrases, the attention of the fact finder will be correctly focused on his own state of mind, rather than upon the evidence.

It is possible to reach the desired result of having the charge phrased in terms of probabilities in only two ways — by judicial action or by legislation. Isolated judicial opinions have shown a favorable disposition towards this concept, at least to some degree,<sup>120</sup> but no Tennessee decision can be found which has totally abandoned the well accepted phrases and spoken only in terms of probabilities — nor is one anticipated. Although legislation setting forth an instruction complete as to all elements with special emphasis on the measure of persuasion is a possible solution,<sup>121</sup> the problem, being somewhat academic in nature, seemingly could best be treated within a small group intimately associated therewith and equipped to deal intelligently with

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120. *Hamilton v. Zimmerman*, 37 Tenn. (5 Sneed) 39 (1857) stated that a civil claim must be established by proof sufficient to satisfy the mind of the "probable truth" of the fact alleged. The use of "probable truth" seems negated by the qualifications of "establish" and "satisfy" which result in a requirement of more certainty than would a balancing of probabilities. *Bryan v. Aetna Life Ins. Co.*, 174 Tenn. 602, 130 S.W.2d 85 (1939) stated that it was sufficient in civil cases if the party having the burden of proof made out the "more probable hypothesis." However, the tendency in subsequent decisions has been to qualify this view by substituting "preponderance of evidence" for "more probable hypothesis" and equating the two. See *Law v. Louisville & N. R.R.*, 179 Tenn. 687, 170 S.W.2d 360 (1943); *Noe v. Talley*, 38 Tenn. App. 342, 274 S.W.2d 367 (E.S. 1954); *Finks v. Gillum*, 38 Tenn. App. 304, 273 S.W.2d 722 (M.S. 1954); *Yearwood v. Louisville & N. R.R.*, 32 Tenn. App. 115, 222 S.W.2d 33 (M.S. 1949); *Havron v. Sequachee Valley Elec. Co-Op*, 30 Tenn. App. 234, 204 S.W.2d 823 (en banc 1947); *Tennessee Cent. Ry. v. McCowan*, 28 Tenn. App. 225, 188 S.W.2d 931 (M.S. 1945). This seems clearly erroneous. A preponderance of evidence refers to an amount of evidence. A probability on the other hand is a degree of belief. Evidence is that which enables one to discern probabilities and is not the probability itself. An occasional opinion closely approaches a correct phrasing in terms of probability. For example, see the opinion of Felts, J. in *Good v. Tennessee Coach Co.*, 30 Tenn. App. 575, 209 S.W.2d 41 (M.S. 1947) (the more probable hypothesis should control).

121. CAL. PEN. CODE § 1096 (Deering 1949) is the only real attempt in this country to provide by legislation the exact charge as to measure of persuasion in a criminal case. Although this is an admirable undertaking, the actual definition given is phrased in the meaningless terms of "abiding conviction to a moral certainty." See also Palmer, *Standardized Jury Instructions Succeed*, 23 JOURNAL OF THE AMERICAN JUDICATURE SOCIETY 77 (1940), 20 FLA. L.J. 60 (1946). For proposed remedial statutes as to charges on the measure of persuasion see McBaine, *Burden of Proof: Degrees of Belief*, 32 CALIF. L. REV. 242 (1944).



it. Fortunately, the framework for such a deliberative body is readily available. The Tennessee Code provides for a Judicial Conference<sup>122</sup> composed of judges of courts of record<sup>123</sup> and the attorney general<sup>124</sup> which is to meet annually<sup>125</sup> and has as one of its functions

the consideration of any and all matters pertaining to the discharge of the official duties and obligations of its several members, to the end that there shall be a more prompt and efficient administration of justice in the courts of this state.<sup>126</sup>

Such a group is eminently qualified to weigh the merits and demerits of these suggestions and implement any results reached directly into the trial and appellate practice. It is strongly recommended that the Judicial Conference take cognizance of and rectify this deficiency in Tennessee procedure. For, as stated by Professor Morgan:

If we are to expect jurors to act with intelligence in weighing the evidence, certainly we should insist that the courts cease giving them instructions in language which cannot convey the intended meaning to them and which frequently judges themselves do not understand.<sup>127</sup>

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122. TENN. CODE ANN. §§ 17-401 to -07 (1955).

123. *Id.* § 401.

124. *Id.* § 402.

125. *Id.* § 404.

126. *Ibid.*

127. Morgan, *Presumptions*, 10 RUTGERS L. REV. 512, 522 (1956).