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# Reasonable Doubts Under the Non-Support Act in West Virginia

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# REASONABLE DOUBT UNDER THE NON-SUPPORT ACT IN WEST VIRGINIA*

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In a recent enactment passed by the West Virginia Legislature, commonly called the "Non-support Act"[1] the following appears as part of Section 5:

> "No other or greater evidence shall be required to prove the marriage of such husband and wife, or that the defendant is the father, or that the alleged mother is the mother of such child or children, than is or shall be required to prove such facts in a civil action."

This act amends and re-enacts Chapter 51 of the Acts of 1917; but the portion above quoted appears in substantially its present form as part of Section 6 of the former Act.

There can be little doubt that non-support, by this act, is made a crime, although the "Justice, before whom such conviction is had, may, in lieu of the penalty herein provided, or in addition thereto, * * * require the defendant to pay a certain sum periodically to the wife * * and to release the defendant" upon giving bond, etc. In case there is default in the payment the Justice may re-arrest the defendant and "sentence him under the original charge". All of the elements entering into the definition of a crime are present here, except compulsory punishment by fine or imprisonment on conviction; but it would seem that the discretion given to a Justice to accept a proper bond conditioned as the statute prescribes is in nature and effect simply authority to him to parole the defendant on condition that he make the periodical payments specified in the bond. Non-support is by the act made a crime; it is punishable by the state in a proceeding in its own name; it is punishable even though the punishment may be suspended under certain conditions.

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[1] Ch. 73 of the Acts of 1925.

The legislature has in express terms provided that one or more of the essential elements of the crime of non-support may be proved by a mere preponderance of the evidence; proof "beyond a reasonable doubt" of such elements is not required. In so providing, did the legislature transcend its constitutional limitations?

The principle here involved is one of importance; if it is within the power of the legislature to provide that this particular crime may be proved by a mere preponderance of the evidence, no reason is perceived why it may not enact a similar provision as to the degree of proof required for conviction of any and all other crimes, from murder and rape down through the whole category to possession of liquor. Such a general law would revolutionize our criminal procedure. Theoretically, at least, it would certainly tend to make convictions easier for the prosecuting attorney; and practically it would have the same effect, for it would deprive counsel for the defendant of his chief weapon (which was intended rather as a shield than as a weapon),—The argument that there is a "reasonable doubt" in the case; the argument what is a reasonable doubt? The argument—is the doubt reasonable? Theoretically, these arguments may be specious; practically, they give the juror inclined to be swayed by sympathy for the defendant a reason with which he may combat the opposing views of his fellow-jurors and which may very effectually salve his conscience for voting to acquit in a case in which to all others the proof of guilt is overwhelming.

We are not now concerned with the policy of such legislation; we are interested only in its validity—its constitutionality.

By a familiar rule, the legislature may enact any law which does not violate a provision of the constitution and does not destroy or tend to destroy or trench upon any right guaranteed by the constitution. Therefore, when it is contended that a particular act is unconstitutional, it must be held constitutional unless a particular provision can be found in the constitution which it violates or infringes upon. The question therefore is:

"What particular provision of the constitution is violated

by legislation that in a criminal case a defendant may be convicted on no higher or greater degree of proof than is required in civil cases?"

There are two, and as we view it, only two provisions in our constitution which could possibly have any bearing on this question; namely, the "due process of law" provision (Sec. 14 of Article 3).

> (1) "No person shall be deprived of his life, liberty or property without due process of law and the judgment of his peers."

In a West Virginia Case[2] the court, speaking through Judge Green held that the word "and" in this section is to be read "or"; so that the section is to be interpreted as if it read:

> "No person shall be deprived of his life, liberty or property without due process of law *or* the judgment of his peers."

Volumes have been written on what is due process of law; the definitions are as unsatisfactory as the definitions of reasonable doubt. As applied to the question in hand and in trying to ascertain whether permitting a crime to be proved by a mere preponderance of evidence is a denial of due process of law, the decisions afford us some indirect light.

That the legislature may *change* the rules of evidence in criminal cases without violating the constitutional provision above may be regarded as settled law, provided such change applies only to acts thereafter done and does not deny to the defendant the opportunity to present his defense.

In 1915 the legislature[3] sought to make the possession of liquor seized *conclusive* evidence of the unlawful keeping, storing and selling of the same. It was held that such a provision violated the section of the constitution under consideration, because to hold it valid would be to "close the mouth of a person when he comes into court to vindi-

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[2] Jelly *v.* Dills, 27 W. Va. 267 (1885).
[3] §31 of Ch. 70 of the Acts of 1915.

cate his rights", and that "such a statute would permit a person to be convicted without due process of law."[4]

The legislatures of the various states have frequently provided that proof that fact "A" exists shall be *prima facie* proof that fact "B" exists. Such legislation is upheld provided there is some casual or logical connection between fact "A" and fact "B". If in truth, in logic, and in common sense the existence of fact "A" does not even tend to prove the existence of fact "B", then we take it no amount of legislative dicta could make it so and a statute providing that proof of fact "A" should be even *prima facie* proof of fact "B" would be invalid. In other words, should the legislature undertake to say that fact "A" shall be regarded as proving or tending to prove fact "B", the courts would refuse to give approval to such legislative provision if fact "A" in logic does not tend to prove fact "B".

This, so far as our investigation discloses, is about as far as the courts have gone or are likely to go in determining to what extent the due process of law provision of the constitution controls the legislature as to rules of evidence in criminal cases and the holdings of the courts may be summarized as follows:

No defendant can complain that he is deprived of his liberty without due process of law so long as he is tried on evidence the rules as to which have been enacted prior to the commission of the act complained of; so long as there is no incongruity between the facts proved and the inferences authorized therefrom by statute and so long as he has had an opportunity to present his evidence unhampered by legislative restrictions and limitations destroying or tending to destroy its probative force.

We have left out of consideration the constitutional provisions against unreasonable searches and seizures and the decisions based thereon and against self-crimination and the decisions based thereon. They are beyond the scope of the due process of law provision.

(2) Does legislation authorizing proof of guilt in a criminal case by a mere preponderance of evidence violate Sec. 14 of Article 3 of the Constitution?

It may plausibly be argued, and the argument is doubtless sound, that if proof of guilt in a criminal case beyond a reasonable doubt was an inseparable incident of trial by jury as it existed at the common law, then the legislature could not decree that a less degree of proof is sufficient without destroying an element of trial by jury.

Whence comes then this principle that no defendant shall be convicted in a criminal case unless his guilt is proved beyond a reasonable doubt?

Unfortunately the writer has not access to the older authorities. Greenleaf uses this language:

> "In criminal cases a rule has grown up that the persuasion must be beyond a reasonable doubt. This distinction seems to have had its origin no earlier than the end of the eighteenth century, and to have been applied at first only in capital cases, and by no means in a fixed phrase, but in various tentative forms. "A clear impression," "upon clear grounds," "satisfied," are the earlier phrases; and then "rational doubt," "rational and well-grounded doubt," "beyond the probability of doubt," and "reasonable doubt" come into use. Then, in Mr. Starkie's classical treatise, "moral certainty, to the exclusion of all reasonable doubt," is given vogue."[5]

Bearing this clear statement in mind it is apparent that no court has ever considered proof beyond a reasonable doubt as an essential element of trial by a jury at the time of the establishment of the American union.

As tending to show, if indeed not actually showing that the legislature may pass such a provision as has been suggested, without violating any constitutional limitations, it is well worthy of note that in *State* v. *Goudy*[6] the non-support law as it existed under the Act of 1917 was under consideration and the case appears to have been vigorously contested. No question seems to have been raised as to the constitutionality of the provision that no greater proof shall be required in such cases of the marriage of the man and woman, or of the paternity of the child, than is required in civil cases. The constitutionality of the statute was not even questioned.

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[4] State *v.* Sixo, 77 W. Va. 243, 87 S. E. 267 (1915).
[5] GREENLEAF, EVIDENCE (16th ed.) §81-c.
[6] 94 W. Va. 542, 119 S. E. 685 (1923).

Our conclusion, therefore, is, that the legislation under consideration transcends no constitutional rule and there is no constitutional reason why the legislature may not provide, if it sees fit, that in any criminal case evidence of the defendant's guilt, if it preponderates, shall be sufficient to warrant a conviction.

We cannot leave this subject, however, without quoting a statement of the policy of the law:

> "In criminal cases, the humanity of our law requires that the guilt of the accused should be fully proved. It is not sufficient that the weight of evidence points to his guilt, but the jury must be satisfied beyond a reasonable doubt of his guilt, or he must be acquitted. It is deemed in our law better that many guilty persons escape than that one innocent person should suffer. This maxim, obviously, is not founded upon any technical rule or system of pleading, but is based upon broad principles of humanity, which forbid the infliction of punishment until the commission of the crime is to a reasonable certainty established. It has received the sanction of the most enlightened jurists in all civilized communities, and in all ages; and with the increasing regard for human life and individual security, it is quite apparent that the energy of the rule is in no degree impaired."[7]

The rule, requiring proof beyond a reasonable doubt, like the other rules of evidence which the common law produced, is founded, as Mr. Greenleaf has approvingly quoted:

> "In the charities of religion, in the philosophies of nature, in the truths of history, and in the experience of common life."

It should not be destroyed by legislative fiat.

[7] 8 R. C. L. 218.