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Municipal Corporations: Burden of Persuasion Required in Ordinance Violations

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possessor will be required before the visitor will be held to be an invitee. This is consistent with the logic inherent in the "invitation" theory, and finds support in the fact that no Wisconsin cases have been found where a person was held to be an invitee where some possibility of such benefit was not present. As stated in the *Greenfield case,*[31] the court, in making its determination, will look to all the circumstances, including the nature of the invitation and necessary implications to be derived therefrom. JOHN P. FOLEY

Municipal Corporations: Burden of Persuasion Required in Ordinance Violations: Defendant was found guilty of racing his automobile in violation of a city ordinance[1] which has a direct counterpart in a criminal state statute.[2] The circuit court reversed the conviction on the ground that the evidence was insufficient to sustain it. When confronted with *City of Madison v. Geier*[3] on appeal, the Wisconsin Supreme Court, in a four-to-three decision, held that when a violation of a municipal ordinance also constitutes a crime under state law it must be proved by *clear, satisfactory and convincing evidence.*

In coming to its conclusion the majority reviewed the three well-accepted burdens of proof:[4]

(1) Mere preponderance.
(2) Clear, satisfactory and convincing.
(3) Beyond a reasonable doubt.[5]

The first two are applied to civil cases—the first to the ordinary civil case and the second to those civil cases which involve fraud or criminal offenses.[6] Observing that ordinance violations have long been held to

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[31] *Ibid.* note 18.

[1] Madison, Wis., Municipal Code §12.86.

[2] WIS. STAT. §346.94(2) (1963) providing: "Racing. No operator of a motor vehicle shall participate in any race or speed or endurance contest upon any highway."

[3] 27 Wis. 2d 687, 135 N.W. 2d 761 (1965).

[4] A precise definition of the two meanings of the phrase "burden of proof" is found in Sellers v. Kincaid, 303 Ill. 216, 155 N.E. 429 (1922). In this civil case, the clear distinction is made between (1) the duty of producing evidence as the case progresses, and (2) the duty to establish the truth of the claim by a preponderance of the evidence. One able writer, MCCORMICK ON EVIDENCE, §307 (1954), explains the former as the *burden of producing evidence* and the latter as the *burden of persuasion.* See also 9 WIGMORE, EVIDENCE, §§2485-2489 (3rd ed. 1940).

[5] The majority in the *Geier* case was therefore referring to the three measures of the jury's persuasion designated by Wigmore, *supra* note 4, §§2497-2498, as (1) mere preponderance, (2) clear, satisfactory and convincing, and (3) beyond a reasonable doubt. See also McCormick, *supra* note 4, §§318-321.

[6] Roberts v. Saukville Canning Co., 250 Wis. 112, 26 N.W. 2d 145 (1947); Poertner v. Poertner, 66 Wis. 644, 29 N.W. 386 (1886); see also McCormick, *supra* note 4, §320 and Wigmore, *supra* note 4, §2498. Clear satisfactory and convincing evidence has been held to be required in those civil cases which involve fraud, undue influence, a lost deed or will, a parol gift, an agreement for adoption or to bequeath by will, mutual mistake sufficient to justify reformation of an instrument, a parol or constructive trust, an oral contract

be civil actions[7] and that in this case a criminal act was involved, the majority logically found that the prosecution in such a case must prove the guilt of the defendant by evidence which meets the second burden of proof, *i.e.*, that applied in civil cases involving fraud or criminal offenses.[8]

The minority advanced a vigorous argument for the retention of the mere preponderance burden in all forfeiture cases. This position was based on their conclusion that no sufficient reason had been shown which would justify changing the well established mere preponderance rule.[9]

The question of which burden of persuasion should be required in ordinance violation cases has been met with varied answers based upon diverse reasonings. The various states hold as many views on the subject as appear possible.

The decision of the Minnesota Supreme Court in *State v. Jamieson*[10] exemplifies a line of cases which require only a mere preponderance of the evidence in all municipal ordinance violation cases, whether involving acts also constituting crimes or not. These cases do not consider the possibility of using the middle burden of proof where the violation also constitutes a crime under state law. As between the first and third burdens, the decisions rest on the basic premise that proof beyond a reasonable doubt can only be required in prosecutions by the state for an offense constituting a violation of a criminal statute;[11]

as a basis for specific performance, an agreement to hold a deed absolute as a mortgage and other specific points held to be of importance in local practice.

[7] The Wisconsin Supreme Court has consistently held that a suit to recover a penalty for the violation of a municipal ordinance is a civil action. Village of Platteville v. Bell, 43 Wis. 488 (1878). See also Neenah v. Krueger, 206 Wis. 473, 475, 240 N.W. 402, 404 (1932) in which the court said: "Under the statutes of this state, actions are of two kinds—civil and criminal. A criminal action is defined as one prosecuted by the state against a person charged with a public offense for the punishment thereof. Every other action is a civil action."

[8] Madison v. Geier, 27 Wis. 2d 687, 692, 135 N.W. 2d 761, 763 (1965), where the court phrased its conclusion as follows: "We considered ordinance forfeiture cases so far as the elements of the violation were concerned when the acts also amounted to a crime to be in that class of civil actions which involved fraud, undue influence, criminal acts, reformation, mutual mistakes, and others, which public policy requires to be proved by evidence which is clear, satisfactory and convincing."

[9] *Id.* at 699, 135 N.W. 2d at 767.

[10] 211 Minn. 262, 300 N.W. 809 (1941). See also Handler v. City and County of Denver, 102 Colo. 53, 77 P. 2d 132 (1938); City of Bloomington v. Kossow, —— Minn. ——, 131 N.W. 2d 206 (1964); State v. Siporen, 215 Minn. 438, 10 N.W. 2d 353 (1943); Warren v. State, 162 Neb. 623, 76 N.W. 2d 728 (1956); Francisco v. State, 108 Neb. 440, 187 N.W. 881 (1922); City of Sparta v. Lewis, 91 Tenn. 370, 23 S.W. 182 (1892).

[11] State v. Jamieson, 211 Minn. 262, 300 N.W. 809, 810 (1941) where it was said: "It has repeatedly been decided by this court, as it has elsewhere, that municipal ordinances are not criminal statutes; that violations thereof are not crimes, nor are such violations governed by the rules of the criminal law, save in certain specified exceptional particulars."

"It has long been settled that the violation of a city ordinance is not a

but that since forfeiture cases are prosecutions by municipalities for ordinance violations, rather than prosecutions by the state for criminal statute violations, proof beyond a reasonable doubt may not be required.[12] The same anachronistic result was reached by the Delaware Supreme Court when it concluded that if the prosecution were for the violation of state law, guilt must be proved beyond a reasonable doubt; but if for the violation of an identical city ordinance, guilt need only be proved by a mere preponderance of the evidence.[13] Standing alone, the Oregon supreme court has held that a forfeiture case is criminal in nature. However, that court then came to the unprecedented conclusion that because of the criminal nature of that case it need only be proved by a mere preponderance of the evidence.[14]

Because of the penal nature[15] of ordinance violation cases, several states have adopted a burden of persuasion which is at least slightly more strict than the mere preponderance burden.[16] Although not expressed in exactly the same language, the burden of proof used by these states is the practical equivalent of the clear, satisfactory and convincing burden now adopted by Wisconsin. However, the other states which require the middle burden to be met in order to produce a conviction hold this burden applicable to all forfeiture cases whether constituting a crime or not.[17] This uniform application of the middle burden of proof has been justified on the theory that an individual should not be subjected to fines which will divest him of his property merely because there is a little more evidence that he has committed the prohibited act, than there is that he has not. The Illinois supreme court felt that "to allow a jury to enter upon this nice balancing of probabilities in cases of this character, would be to open wide a dangerous door."[18] With the reasoning of this decision in mind, it becomes

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criminal offense against the state, but only against the municipality enacting the ordinance, and that the provisions for enforcing such ordinances and for prosecuting violations thereof need not conform to the provisions for prosecuting violations of the state laws."

[12] *Ibid.*

[13] Mayor and Council of Wilmington v. Durham, 51 Del. 423, 147 A. 2d 516 (1958).

[14] In dealing with an ordinance requiring the licensing of messengers, the Oregon Supreme Court held that: "This being in the nature of a criminal action, the evidence must prove a violation of the provisions of the ordinance by a mere preponderance only, and such proof need not be direct." City of Portland v. Western Union Telegraph Co., 75 Ore. 37, 146 P. 148 at 151 (1915).

[15] "Penal means containing or relating to a penalty. A penal action is one upon a penal statute, it is an action which enforces a forfeiture or penalty for transgressing the law. The term penal is broader than criminal and relates to actions which are not necessarily criminal as well." BLACK, LAW DICTIONARY 1289 (4th ed. 1951).

[16] Toledo, Peoria and Warsaw Railway Co. v. Foster, 43 Ill. 480 (1867); City of Chicago v. Carney, 34 Ill. App. 2d 303, 180 N.E. 2d 729 (1962); Jersey City Land and Improvement Company v. Mayor and Aldermen of Jersey City, 95 N.J.L. 34, 111 A. 275 (1920).

[17] Cases cited note 16 *supra.*

[18] Toledo, Peoria and Warsaw Railway Co. v. Foster, *supra* note 17, at 481

apparent that the line of cases requiring the middle burden of persuasion holds the consequences of a forfeiture action to be similar to the consequences of a criminal proceeding rather than to those of a civil proceeding.

This rational approach of looking to the consequences of the action takes the realities of the situation into account more fully than does the rationale of the cases which merely inquire as to which body is prosecuting the action, the state or its subdivision, the municipality. In an extention of this view, a third and very convincing line of cases has reached the conclusion that forfeiture actions should be proved beyond a reasonable doubt.[19] This result is based on the principle that a prosecution for the violation of a city ordinance is civil in form but quasi-criminal in character.[20] Forfeiture cases have been systematically held to be governed by the civil rules of pleading,[21] but if they were solely civil no fine or imprisonment could be inflicted.[22] Nor can they be forced into the strict definition of a criminal action, because they are not techni-

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where the court in emphasizing its point went on to say: "Before a jury renders a verdict taking away a person's property in the form of a fine, they should be *satisfied* that the law has been violated, and if the evidence fails to produce upon their minds, that degree of conviction upon which they should be willing to act in important affairs of their own, it is not sufficient, even though there may be a very slight perponderance."

[19] People v. Levine, 21 App. Div. 2d 903, 251 N.Y.S. 2d 721 (1964) (violations of the health code must be proved beyond a reasonable doubt); People v. Severns, 37 Misc. 2d. 382, 234 N.Y.S. 2d 834 (1962) (convicted of operating a junk yard without a license in violation of city ordinance; held that every essential element of the charge must be proved beyond a reasonable doubt); People v. Staie, 10 Misc. 2d 959, 172 N.Y.S. 2d 351 (1958) (as to a violation of a speeding ordinance the court said the same fundamental rules apply to proof necessary for convictions under city ordinances as apply to convictions for crimes, and all essential elements must be proved beyond a reasonable doubt); People v. Scandore, 6 N.Y. Misc. 2d 152, 165 N.Y.S. 2d 785, motion granted 167 N.Y.S. 2d 917, 145 N.E. 2d 866 (1958) (A violation of park rules must be proved so that no reasonable doubt of the defendant's guilt remains). As is apparent from the above decisions, the New York courts require all forfeiture cases to be proved beyond a reasonable doubt.

Ohio requires ordinance violation cases to be proved beyond a reasonable doubt when the act constituting the violation is also prohibited by state law. This is achieved by designating such an ordinance violation prosecuting a criminal action. See City of Berea v. Petcher, 119 Ohio App. 165, 188 N.E. 2d 605 (1963) and City of Columbus v. Treadwell, 46 Ohio L. Abs. 367, 65 N.E. 2d 720 (1946).

See also Smith v. City of Birmingham, —— Ala. App. ——, 168 So. 2d 35, 38 (1964) (in speaking of the violation of a loitering ordinance the court stated that "the burden of proof is the same in both misdemeanor and ordinance trials. The rules of evidence are the same. The defendant can suffer virtually the same incarceration and pay similar fines."); Long v. City of Opelika, 37 Ala. App. 200, 66 So. 2d 126 (1953); Geer v. Alaniz, 138 Colo. 177, 331 P. 2d 260 (1958) (In considering a habeus corpus proceeding by prisoners convicted of ordinance violations, the court held that violations of ordinances which have counter parts in criminal statutes are triable in accordance with criminal procedure); Elias v. City of Tulsa, 342 P. 2d 573 (Crim. App. 1959) (city had the burden of proving the violation of a zoning ordinance beyond a reasonable doubt).

[20] City of Stanberry v. O'Neal, 166 Mo. App. 709, 150 S.W. 1104 (1912).

[21] City of St. Louis v. Flynn, ——Mo.——, 386 S.W. 2d 44 (1965).

[22] City of Stanberry v. O'Neal, 166 Mo. App. 709, 150 S.W. 1104 (1912).

cally offenses against the state in its sovereign capacity.[23] In speaking of municipal forfeitures the Alabama supreme court stated that "these offenses—particularly those which may be punished by imprisonment or hard labor—partake so far of the nature of criminal prosecutions that they should be subject to the same rules of evidence."[24]

It is not an uncommon charter power that cities may prescribe either fines or imprisonment in jail, or both, for a violation of an ordinance.[25] It is this power to deprive the individual of liberty and property which has prompted courts to afford the presumption of innocence to defendants in such cases.[26] Granting that the grounds for the presumption are present, "such presumption is but another and more forcible way of stating that the burden is on the state to prove beyond a reasonable doubt the defendant's guilt, and until this is done, he is, in law, not guilty."[27] In considering an ordinance prosecution for disturbing the peace, Justice Ellison aptly stated the guiding principle when he held that "the citizen ought to have the benefit of the presumption of innocence, and he ought not to be disgraced, stigmatized, and punished if the evidence leaves the jury in reasonable doubt of his guilt."[28]

Although the views as to which burden should be required vary widely, they appear to stem from just two basic theories. On the one hand, the states which cling to the more conservative mere preponderance burden base their view on the ancient distinction between civil and criminal cases,[29] easily concluding therefrom that if the prosecution is not by the state the defendant need only be proved guilty by a mere preponderance of the evidence as in all other civil cases. On the other hand, many state courts have taken a more realistic, and perhaps more perceptive, view of the problem and asked themselves what difference it might make to the convicted and imprisoned or fined defendant whether he was prosecuted by the state or by its subdivision, the

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[23] Barron v. City of Anniston, 157 Ala. 399, 48 So. 58 (1908).

[24] *Id.* at 401, 48 So. at 59. See also Smith v. City of Birmingham, ——Ala. App. ——, 168 So. 2d 35 (1964), wherein the Alabama court heavily emphasized the fact that effects and consequences of the two actions are the same.

[25] 5 McQUILLIN, MUNICIPAL CORPORATIONS §15.12 (3rd ed. 1949) and cases there cited.

[26] City of Stanberry v. O'Neal, 166 Mo. App. 709, 150 S.W. 1104 (1912). See also JONES, COMMENTARIES ON THE LAW OF EVIDENCE, 82 (2d ed. 1926) where the learned author, speaking of the presumption of innocence, states that "although some of the reasons which lead to the adoption of this presumption have disappeared with the severity of the old criminal law, yet the sacredness of *reputation* and *liberty* still gives sanction to the rule that the law presumes in favor of innocence. The favor with which this presumption is regarded in the law is illustrated in this, that when misconduct or crime is alleged, whether in a criminal or in a civil suit, whether in a direct proceeding to punish the offender or in some collateral manner, the accused is presumed innocent until proved guilty."

[27] Annot. 34 A.L.R. 938, 939 (1925).

[28] City of Stanberry v. O'Neal, 166 Mo. App. 709, 713, 150 S.W. 1104, 1106 (1912).

[29] See note 11 *supra.*

municipality.[30] The answer to this question being obvious, those courts have afforded the presumption of innocence to all defendants whose liberty or property stands in jeopardy as a result of a prosecution by the state or by the municipality,[31] and thereby required their guilt to be proved beyond a reasonable doubt. The fact that the source of authority is the same for municipal ordinances and state statutes[32] adds additional force to the latter view.

Although, by virtue of *City of Madison v. Geier,* the Wisconsin Supreme Court has adopted the middle burden of proof in those forfeiture cases which also involve crimes under state law, all other forfeiture cases need only be proved by a mere preponderance of the evidence. Our court obviously feels that the delicate distinction drawn between criminal fines, on the one hand, and civil fines (more accurately termed forfeitures or monetary penalties recoverable in a civil action) on the other, is of great import. This distinction rests not on the size or severity but rather on who finally reaps the proceeds. The Wisconsin Constitution makes it clear that the proceeds of all fines (as opposed to civil penalties or forfeitures) shall be paid into the state school fund.[33] Municipal forfeiture proceeds, however, are paid to the local unit of government whose ordinance or regulation imposes the forfeiture, as provided by section 288.10 of the Wisconsin statutes.

The present state of Wisconsin law on the question of burden of proof in forfeiture cases can be brought into clearer focus by considering an example. Suppose A and B, as accomplices, engage in an act prohibited by a city ordinance and by a state criminal statute. Suppose further that A is prosecuted by the municipality under the ordinance and B is prosecuted by the state under the criminal statute. If in both cases the prosecution produces evidence which meets the middle burden of proof, *i.e.,* clear, satisfactory and convincing, but which does not meet the third burden, *i.e.,* guilt beyond a reasonable doubt, A would be convicted because the required burden for a forfeiture case was met while B would not be convicted because the criminal burden was not met. The same act was committed by both. The respective prosecutions produced the same evidence. The result, however, was different. The inquiry seems clear: if the law comes from the same authority, covers

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[30] See cases cited note 19 *supra* and Barron v. City of Anniston, 157 Ala. 399, 48 So. 58 (1908).

[31] *Ibid.*

[32] One learned writer expresses the point as follows: "The reason for such binding effect of municipal ordinances is that both municipal ordinances and state statutes are from a common source of authority. One class presents it in a delegated, and the other in a direct form, but it is the power of the state which speaks in both." 5 McQUILLIN, MUNICIPAL CORPORATIONS §15.14 (3rd Ed. 1949) and cases there cited.

[33] Wis. Const., art X, §2. See also State ex rel. Keefe v. Schmiege, 251 Wis. 79, 28 N.W. 2d 345 (1947) and Stoltman v. Town of Lake, 124 Wis. 462, 465, 466, 102 N.W. 920, 921 (1905).

the same offenses and the effects of enforcement are the same, why should the defendant in the state prosecution be afforded the presumption of innocence, requiring him to be proved guilty beyond a reasonable doubt, while the defendant in the municipal prosecution is not presumed innocent?

In view of the strong argument for affording the presumption of innocence to defendants in ordinance violation cases, which has been recognized by many other states, partial departure from the mere preponderance rule by our court in the *Geier* case could be an indication of a more complete departure in the future should the court be confronted with the proper case.

TERRY R. GRAY

Products Liability: Strict Liability in Tort—Defenses—Indemnity—Contribution: In 1957, plaintiffs Suvada and Konecnik, partners, purchased a used reconditioned tractor unit from defendant White Motor Company, for use in their milk distributing business. The brake system for the tractor was manufactured by defendant Bendix-Westinghouse Automotive Air Brake Company and installed by White. Three years later, the brake system failed and the truck collided with a Chicago Transit Authority bus, causing injuries to a number of the bus passengers and considerable damage to the bus and plaintiff's tractor-trailer milk truck. In *Suvada v. White Motor Co.*,[1] the plaintiffs sued to recover the costs they incurred in (1) repairing their tractor-trailer unit, (2) repairing the bus, and (3) settling the personal injury claims of the bus passengers, including the costs of legal services and investigation.

The complaint alleged that both Bendix and White were liable for the stated damages because of a breach of implied warranty and negligence. The trial court, in response to the defendants' motion, ruled plaintiffs had stated causes of action for damages to their tractor-trailer unit against White on the warranty and negligence theories, and against Bendix on the basis of negligence but dismissed the counts for damage to the bus, personal injury claims, and expenses. Plaintiffs appealed from this order to an intermediate appellate court, which ruled that plaintiffs had stated causes of action for all elements of damage pleaded against White and Bendix, on the basis of breach of an implied warranty.[2]

Only Bendix sought review of this holding, giving rise to the decision herein discussed. Bendix argued that any warranty as to its products ran only to White, since the plaintiffs were not in privity with Bendix. The Illinois Supreme Court, however, ruled that Bendix's

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[1] —— Ill. 2d. ——, 210 N.E. 2d 182 (1965).
[2] Suvada v. White Motor Co., 51 Ill. App. 2d 318, 201 N.E. 2d 313 (1964).