STANDARDS OF PROOF IN THE DIVORCE COURT*

'A CORRECT mode of expressing degrees of persuasion and probative force', said Bentham,[1] is 'an object of no inconsiderable importance; and the further we go into the subject the clearer will be the light in which the importance of it will present itself.' His solution of the problem, which was that of a numerical scale wherewith to evaluate these degrees, he tendered as the only adequate method of assessment owing to 'the incapacity of ordinary language for expressing degrees of persuasion and probative force'. Such incapacity [2] of language, it may be surmised, is likely to be at the root of the difficulties which may arise from the Court of Appeal's recent decisions upon the standard of proof of matrimonial offences, which bid fair to upset a terminological distinction which has grown up over the last century and a half between proof in civil and criminal cases. The question of the application of the criminal courts' standards to cases in the Divorce Court has 'caused a certain amount of discussion, and, no doubt, the question may require to be finally settled hereafter',[3] but, although the Court of Appeal has, since the occasion of that dictum, taken at least two opportunities of pronouncing on the matter [4] and the House of Lords has had before it [5] a case in which 'a question was raised as to the standard of proof', it may be doubted whether finality has been reached. Indeed, it may well be that the last word will remain with Locke [6] who told us that in the twilight of probability 'it is impossible to reduce to precise rules, the various degrees wherein men give their assent' [7]; but it is

* Based upon a lecture delivered to inaugurate the Chair of Jurisprudence in the University of Bristol.

[1] *Rationale of Evidence*, Bk. I, c. 6.

[2] Or, rather, inconsistency: see n. 66, *infra*.

[3] *Per* Bucknill L.J. in *Davis* v. *Davis* [1950] 1 All E.R. 40.

[4] In *Gower* v. *Gower* [1950] 1 All E.R. 804 and *Bater* v. *Bater* [1950] 2 All E.R. 458. More recently, Bucknill L.J. ([1950] P., at p. 188) has cited with approval the dictum of Lord Birkenhead L.C. in *C. (otherwise H.)* v. *C.* [1921] P. 339, 403, to the effect that 'the petitioner must remove all reasonable doubt' where she undertakes the burden of proof of 'a grave and wounding imputation' of physical incapacity.

[5] *Preston-Jones* v. *Preston-Jones* [1951] 1 T.L.R. 8; [1951] 1 All E.R. 124.

[6] *Essay on the Human Understanding*, Bk. IV, c. 16, s. 9.

[7] Usually, the probability on which one must act is 'vague and quite incapable of numerical measurement' as it involves 'intrinsic doubtfulness' (Russell *Human Knowledge*, p. 357). Since 'feelings of great intensity do not have parts which are themselves feelings of less intensity', it follows that 'we need not think of degrees of acceptability as fractions like the degrees of probability in matters of chance' (Kneale, *Probability and Induction*, p. 15, 246). And, although the law is concerned only with degrees of belief which are rational, that is, with those logically justified by the evidence, yet these can be expressed only in terms of degrees of confidence. And perfect confidence, it may be remembered, is an unattainable upper limit: cf. Bentham, *op. cit.*, *Preliminary View*, c. 12.

submitted that the administration of justice requires a greater measure of precision that that so far vouchsafed by the courts.[8]

To the now traditional civil cases capable of proof by a preponderance of evidence and criminal cases sustainable only by proof beyond reasonable doubt, there is added a new type of civil case to be proved beyond reasonable doubt but not necessarily so strictly as would be required if it were a criminal case. The distinction in the recent past has been that in a criminal case a jury could find a fact only if such doubts as they had were vague, shadowy, fanciful or trivial, whereas in a civil case their doubts might, in spite of their finding, be real or substantial. The distinction between trivial and substantial doubts came to be expressed in the two contrasted terms proof by preponderance of evidence and proof beyond reasonable doubt.[9] These two terms appear to have been employed to indicate respectively the minimum of proof on which it would be rational to found a belief and the maximum of proof of which in human affairs we are capable.[10] They appear, moreover, to have been commonly employed to distinguish civil [11] from criminal cases.[12] This dichotomy, which was perhaps an over-simplification, has now disappeared in order to make room for the Divorce Court's requirements of a degree of assurance higher than is normally expected in a civil case, but lower than is required in a criminal case.[13] The decision of the Court of Appeal in *Bater* v.

[8] In *Lyons* v. *Lyons* (*Carne intervening*) [1950] N.I. 181, Andrews L.C.J. declared the law to be in an unsatisfactory state which called for the intervention of the legislature or of the House of Lords to ' remove the ambiguities which have arisen from conflicting judicial opinions, and so clarify a situation, the continued retention of which would not be to the credit or advantage of legal administration '. It is submitted with respect that the subsequent decision of the House of Lords in *Preston-Jones* v. *Preston-Jones*, *supra*, does not afford the ' clarification ' which the learned Chief Justice considered so necessary.

[9] See, for example, the distinction taken in Starkie's *Evidence* (1824) I, 450–3. 514, II, 414–5.

[10] ' Moral certainty and the absence of reasonable doubt are in truth one and the same thing.' (*Taylor on Evidence*, 12th ed., p. 67.)

[11] With the exception of bastardy proceedings, where, for a reason of public policy quite distinct from that in criminal cases, proof beyond reasonable doubt is required: see 65 L.Q.R. 223, n. 32.

[12] That this distinction has been taken in the courts appears most clearly perhaps from those cases in which the proof of some matter is placed on the accused, for there the jury should be directed that ' the burden of proof required is less than that required at the hands of the prosecution in proving the case beyond reasonable doubt; and that the burden may be discharged by evidence satisfying the jury of the probability of that which the accused is called upon to establish ' (*R.* v. *Carr-Briant* (1943) 59 T.L.R. 300, 302). Cf. *R.* v. *Ward* [1915] 3 K.B. 696, cited in the above case as being to the effect that the accused is never placed in such a position ' as to require of him that he should prove his case beyond reasonable doubt '.

[13] The ratio decidendi of *Bater* v. *Bater*, *supra*, is that the Divorce Court's and the Criminal Court's standards are distinct. In his note upon *Preston-Jones* v. *Preston-Jones*, in 14 M.L.R. 225, Mr. Treitel concludes that no such distinction can now be drawn, since even Lord MacDermott's rejection of an analogy of the criminal law is coupled with an acceptance of ' the same general standard ' as applicable to both. As the matter stands, however, the Court of Appeal has clearly stated the existence (though not the nature) of a distinction

Bater [14] that the term 'beyond reasonable doubt' is apt to describe the standard of proof in this last type of case, while it impliedly indicates the illogicality of the former simple distinction, may nevertheless give rise to more problems than it solves. A consideration of these problems may perhaps with advantage be prefaced by an indication of the fact that the courts have recently reached their conclusion in three distinct stages, for they have decided first, that (at least some) matrimonial offences require proof beyond reasonable doubt as in criminal cases; then secondly, that proof as in criminal cases is not (always) required; and then thirdly, that, none the less, proof beyond reasonable doubt *is* required.

The earliest express equation of the standards of proof in criminal and matrimonial cases appears to be in the dictum of Lord Merriman P. in *Churchman* v. *Churchman*.[15] The Court of Appeal applied this principle to a charge of adultery in *Ginesi* v. *Ginesi* [16] and it is to be remarked that proof beyond reasonable doubt and criminal proof were there regarded as one and the same thing.[17] In *Davis* v. *Davis*,[18] however, the court held that a charge of cruelty as a ground for dissolution of marriage does not require the same standard of proof as is required in a criminal court, so that *Ginesi* v. *Ginesi* [16] could in the light of that decision be regarded as sustainable, if at all, only on the ground of the 'criminal' character of an act of adultery.[19] While the court's negative conclusion in *Davis* v. *Davis* [18] (that cruelty does not require criminal proof) is clear, it is by no means so obvious what positive requirement was then envisaged. Bucknill L.J. while agreeing that 'a slightly too high standard of proof' was set up by the trial judge (who had

between the two standards, and a rejection of this proposition is in no way necessarily implied by the decision in *Preston-Jones* v. *Preston-Jones*. Indeed, had the House considered that its decision concluded this point, one would have expected the Court of Appeal's explicit decision to the contrary to have warranted treatment less cavalier than a casual and somewhat elliptical reference in the last speech to be delivered. It is submitted, therefore, that it would be safer to regard the point as still open, though, to the present writer, the possibility of finding a formula to express the difference alleged to exist seems remote. More recently, however, Evershed M.R. has gone out of his way to utter the warning, in *Allen* v. *Allen* [1951] 1 All E.R. 724, 731, that he 'must not be taken to be asserting any direct connection in point of onus of proof' between adultery and a criminal charge.

[14] [1950] 2 All E.R. 458.

[15] [1945] P. 44. Although the President's pronouncement that 'the same strict proof is required in the case of a matrimonial offence as is required in connection with criminal offences properly so called' has been judicially referred to as a dictum, Lord Merriman, in *Fairman* v. *Fairman* [1949] P. 341, expressed his doubt whether it was merely *obiter*.

[16] [1948] P. 179.

[17] Adultery 'must be proved with the same strictness as is required in a criminal case. That means that it must be proved beyond reasonable doubt to the satisfaction of the tribunal of fact' (*per* Tucker L.J., at p. 181).

[18] [1950] P. 125.

[19] See 66 L.Q.R. 35, 38, and *per* Denning L.J. in *Gower* v. *Gower* [1950] 1 All E.R. 804, 806.

required criminal proof), held nevertheless (at p. 127) that ' if there is any reasonable doubt at the end of the case, then the burden of proof has not been discharged '. There is, however, nothing in the judgment of Denning L.J. to indicate that proof beyond reasonable doubt is required, for the learned Lord Justice expressly states that the statutory burden of ' satisfying ' the court [20] ' is not a burden of extraordinary weight '.[21] Indeed, in a later passage (at p. 129) the opinion is indicated that if criminal proof is not required, proof beyond reasonable doubt is not required. ' There is, it seems to me ', said the learned Lord Justice, ' a danger in asserting, what the statute does not assert, that the charge must be proved beyond reasonable doubt, because of the temptation it affords to give effect to shadowy and fanciful doubts. That standard is a proper safeguard to persons accused in criminal cases, but, if applied in divorce cases, it may mean unjustly depriving an injured party of a remedy which he ought to have '. This statement of law, it may be said with respect, not only indicates the rule, and the reason for the rule, which justice between the petitioner and respondent calls for, but it also implies that whenever a standard of proof higher than a balance of probability is required, it can be justified only on the ground of the *consequences* of the judgment, and not on the ground of the nature of the fact in issue.[22] In *Bater* v. *Bater*,[23] however, both Bucknill and Denning L.J. agree that, although criminal proof is not required in the Divorce Court, nothing less than proof beyond reasonable doubt will suffice. Thus, ' the phrase " reasonable doubt " can be used just as aptly in a

[20] By s. 178 of the Supreme Court of Judicature (Consolidation) Act, 1925, as substituted by s. 4 of the Matrimonial Causes Act, 1950, the court must be ' satisfied on the evidence that the case for the petitioner has been proved '. In *Lyons* v. *Lyons (Carne intervening)*, *supra*, Andrews L.C.J. points out that the statute ' does not expressly define the standard of proof required '.

[21] It will be suggested below that an ' ordinary ' burden of proof is merely that of establishing a preponderance of probability, for it is rational to believe what is probable, though it may not always be rational to act upon such a belief: see n. 44 *infra*. This has always been the standard of proof in civil cases: see Dyer C.J. in *Newis* v. *Lark*, Plowd. 412, cited by Willes J. in *Cooper* v. *Slade*, 6 H.L.C. 746, 772.

[22] It is submitted that this was, unhappily, lost sight of in *Bater* v. *Bater* [1950] 2 All E.R. 458.

[23] [1950] 2 All E.R. 458. This decision is implicit in the earlier judgment in *Gower* v. *Gower* [1950] 1 All E.R. 804, but it might be submitted that the matter was there left inconclusive for, adultery having been proved by an irresistible inference leaving no doubt, the court's pronouncement of what lower standard might have sufficed might be said to be *obiter*. Bucknill L.J. after distinguishing between proof in civil cases (' on a very small margin of preference ') and that in criminal cases (' beyond reasonable doubt ', that is, excluding ' any reasonable hypothesis consistent with innocence ') expressly applied the latter test, and with this Denning L.J. agreed, subject to the caveat that the court was not irrevocably committed to a requirement of criminal proof of adultery. It may be, therefore, that the standard of proof actually adopted in *Gower* v. *Gower* indicates no more than that such standard was in fact reached and not that such standard is required. The finding of the trial judge was reversed because ' he required an exceedingly high standard of proof ' (*per* Denning L.J., at p. 805), though it is difficult to see what stricter test is applicable than that expressly applied by the Court of Appeal, *viz.*, the exclusion of ' any reasonable explanation consistent with innocence '.

civil or a divorce case as in a criminal case ' (*per* Denning L.J. at p. 459). But, if this be so, it is a little difficult to understand the earlier warning of ' the danger in asserting, what the statute does not assert, that the charge must be proved beyond reasonable doubt '. The change of opinion implicit in *Davis* v. *Davis* [24] has apparently been reached by the persuasion of Denning L.J. against his earlier (and, it is submitted with great respect, better) judgment.[25] Against that judgment, and that of the court in *Ginesi* v. *Ginesi*,[26] there has prevailed the opinion [27] that, although the Divorce Court will not expect criminal proof, it will not be content with ' normal ' civil proof, for the court must be satisfied, and ' to be satisfied and at the same time to have a reasonable doubt seems to me to be an impossible state of mind ' (*per* Bucknill L.J. at p. 458). It is submitted with respect that this is to overstate the meaning of the word ' satisfied ', a word which has traditionally been employed to describe the state of mind required of a jury in civil cases.[28] A jury may be satisfied in such cases and still have that ' modest doubt ' which, Shakespeare [29] tells us, ' is called the beacon of the wise '.

But if the term ' proof beyond reasonable doubt ' is no longer to be confined to defining the minimum required in a criminal court, and is to be employed to describe the minimum required in some civil cases [30] (on the ground that the reasonableness of doubts differs from case to case) why should not the term be used in all civil cases, as logic would then demand? If it be true that ' a doubt may be regarded as reasonable in the criminal courts which

[24] [1950] P. 125.

[25] It may further be remarked that, on the occasion of his explanation of the standards of civil and criminal proof in *Miller* v. *Minister of Pensions* [1947] 2 All E.R. 372, the learned Lord Justice would appear to have been satisfied to employ the traditional expressions ' preponderance of probability ' and ' proof beyond reasonable doubt '.

[26] [1948] P. 170.

[27] Consistently advocated by Bucknill L.J. in *Davis* v. *Davis*, *Gower* v. *Gower* and *Bater* v. *Bater*, *supra*.

[28] See, for example, the Reporter's note in *Magee* v. *Mark* (1861) 11 Ir.C.L.R. 449, 469. Though ' satisfy ' may mean ' to set free from doubt or uncertainty ', it may also mean ' to be accepted as all that can reasonably be desired '. A person may be satisfied without being fully convinced; he may be satisfied by what is *sufficient* in the circumstances. In the Universities, it may be surmised, pass students frequently ' satisfy the examiners ' in this sense. So, too, in civil proceedings, for ' it is in the very nature of a vast number, and of probably the majority, of disputed questions of fact in civil controversies, that to whatever side the tribunal inclines, it determines with some mixture more or less, of doubt in its judgment. But a firm mind ought (not) . . . to forebear from deciding by reason of a doubt ' and ' the jury, although they may consider the case a doubtful one, may, upon weighing the evidence, and finding their minds *sufficiently* influenced by a preponderance of it on one side, *be satisfied of the fact*, by that preponderance . . . ' (*per* Pigot C.B., in *Magee* v. *Mark*, *supra*, at pp. 463 and 468). Cf. Bentham, *op. cit.*, Bk. I, c. 6, s. 3.

[29] *Tr. & Cr.*, ii, ii, 16.

[30] *Per* Bucknill L.J. [1950] 2 All E.R. at p. 458.

would not be so in the civil courts ',[31] then, in the only sense in which this is true, all judgments should be beyond reasonable doubt, for the reasonableness of the doubt is thereby related not to the belief but to the action which is to follow upon the belief, on the principle that ' of two hypotheses it may be rational to act on the less probable if it leads to the greater good '.[32] For the purpose of rational belief per se, however, one must ignore all doubt except that which tips the scales over to improbability; as between a fact and its contradictory, a rational man must believe that which has the barest probability. Any court which ' finds ' a fact asserts that it has reasons for believing the existence of the fact and for behaving as if these reasons justified a belief in the certainty of the existence of the fact.[33] The doubts which it has, and reasonably has, are dismissed as impracticable and the question is treated as settled.[34] This is universally true of all findings of fact, no matter what the nature of the fact found, the purpose of the finding or its practical consequences. It is as true of a finding on a balance of probabilities as it is of a finding beyond reasonable doubt. When a court finds for a plaintiff on a preponderance of probability, it is obvious that it has doubts, but it has less doubts about the plaintiff's case than about the defendant's. Equally, when a court finds a fact beyond reasonable doubt, it does not find the fact beyond doubt. It finds (i) that it has doubts, (ii) that the existence of these doubts is reasonable (because of the limitations of the inferences of common sense and science, by reason of which

31 *Per* Denning L.J. [1950] 2 All E.R. at p. 459. So far as concerns beliefs *per se* this statement is not true, for evidence of fact must have the same effect upon the beliefs of a rational tribunal, no matter what the consequences of those beliefs. The statement is true, however, of actions based on those beliefs.

32 Keynes, *Treatise on Probability*, p. 307. Lord Keynes' use of the term ' probable ' to cover not only that which it is rational for us to believe but also the hypothesis on which it is rational for us to act is a source of confusion, for the latter is a preference rather than a rational probability; it is an estimate *as to the future*. Of the making of this estimate, Lord Keynes says no more than that we should determine the probabilities before acting, but Leibniz (cited by Keynes, *op. cit.*, p. 311, n. 1) proposed that if a litigant's claim to a sum of money is twice as probable as that of his opponent, the sum should be divided between them in that proportion. Lord Keynes adds his opinion that ' the doctrine seems sensible ' but it appears never to have been acted on.

33 ' The great excellency and use of the judgment is to observe right, and take a true estimate of the force and weight of each probability; and then casting them up all right together, choose that side which has the overbalance ' (Locke's *Essay on the Human Understanding*, Bk. IV, c. 17). The earliest legal dissertation on evidence—Gilbert's—adopts Locke's conclusions and terminology and opens with the proposition that ' what is to be done, in all trials of right, is to range all matters in a scale of probability, so as to lay most weight where the cause ought to preponderate '. In practice, ' the result is seldom more than a slight elevation or depression of one of two or more sets of comparative probabilities ' (Powell's *Law of Evidence* (1868) p. 2); and see 65 L.Q.R. 220, n. 3, and n. 4).

34 ' We should, in practice, treat as certain whatever has a very high degree of probability. This is a matter of common sense ' (Russell, *op. cit.*, p. 417). When the court does this, it does not assert that it knows something which it does not, and cannot in the nature of things, know, but it none the less acts as if it had such knowledge.

limitations, its conclusions can be no more than probable); but (iii) that, because of the trivial nature of these doubts, it would be reasonable to act as if they did not exist. Thus for a conviction in a criminal case any hypothesis consistent with innocence must be considered so unlikely that it can be treated in practice as impossible. Proof beyond reasonable doubt, therefore, becomes proof beyond those doubts which cannot be ignored in practice.[35] But so in this sense is all proof in a court of law. It is, therefore, submitted that, if the term proof beyond reasonable doubt is no longer to be related to belief per se and employed as a term of art to define proof in criminal cases, it should logically be applied equally to all cases.[36]

It would appear, therefore, that in a court of law, reasonable doubt is not ' simply that degree of doubt which would prevent a reasonable and just man from coming to a conclusion ',[37] it is that doubt which would prevent his *acting* on that conclusion.[38] The question for the courts is not simply whether an opinion is rational, but whether it is rational to act upon it, for a rational belief as to

[35] Reasonable doubt is a doubt which must be taken into account. Normally, in a civil case, account must be taken of a doubt only if it results in a rational opinion that the fact in issue is less likely than not, whereas in a criminal case account must be taken of a doubt if it results in a rational opinion that the contradictory of the fact in issue is more than a ' remote possibility '. The mere possibility of the truth of a hypothesis consistent with innocence will not entail an acquittal, for, if it would, a jury would then be permitted ' to acquit on light, trivial or fanciful suppositions and remote conjectures ' which would be ' a virtual violation of the jurors' oath ' (Starkie, *op. cit.*, I. 514). The impossibility of the accused's hypothesis need not be demonstrated; it is enough to show that it is ' not in the least likely '. This is a recognition of the fact that any calculation of probabilities *a posteriori* must be uncertain, for ' probability begins and ends in probability ' (Keynes, *op. cit.*, p. 322). But the difference between the civil and criminal jury is none the less important. Might one venture to call the civil jury probabiliorists and the criminal jury (on occasion) probabilists?

[36] It is submitted, however, that it would be better to confine the term ' beyond reasonable doubt ' to criminal cases and to accept Starkie's proposition (*Evidence*, I, 451) that ' the distinction between full proof and preponderance of evidence is in its application very important '. The suggestion made by Dr. Allen (*Legal Duties*, p. 287) that there is no distinction between the two appears to be based on the view that the highest degree of assurance is necessary for all conclusions of fact in the courts, because otherwise a jury need not take the same amount of care in a civil as in a criminal case. It is submitted that this does not follow. The jury must be equally careful—to apply whichever of the respective standards the law requires.

[37] *Per* Denning L.J. in *Bater* v. *Bater* [1950] 2 All E.R. 458. If by ' conclusion ' is meant belief in, or assent of the mind to, a proposition rather than its contradictory, a rational man is held from such conclusion only when the doubt is strong enough to establish the improbability of the proposition and the consequent probability of its contradictory.

[38] The court may hold a petitioner to be justified in his claim to a reasonable belief in his wife's adultery on evidence upon which the court could not award him a decree: *Douglas* v. *Douglas* [1951] P. 85. But where a husband has attempted and failed to establish his wife's adultery beyond reasonable doubt, it is no longer open to him to allege that he still has a reasonable belief in her adultery: *Allen* v. *Allen* [1951] 1 All E.R. 724. But this conclusion is not dictated by logic; it is a matter of policy, as in the case of the prisoner given the benefit of the doubt (see *per* Evershed M.R., at p. 731).

the probability of an event is not in itself a conclusive guide to rational action.[39] The law realises that it must always run the risk of failure when it acts (as it must) on probability alone, and in assessing what is best to be done there is a double risk of error—that of a wrong assessment of events of the past (and a consequent erroneous belief) and that of a wrong assessment of the future (and a consequent injudicious act). The question is always that of the degree of risk which is justified and the risk is assessed primarily in terms of the *consequences* of the judgment to be pronounced. While it is logic which dictates the rationality of belief, it is public policy which dictates the rationality of action. Logic compels a jury to find a fact *A* rather than its contradictory *B*, even when their doubts of *A* are substantial, provided their doubts of *B* are more substantial. If it were not for considerations of public policy, it would be irrational to ask a jury to find the contradictory of a fact merely because they had substantial doubts about the fact itself. It is such reasons of policy (based upon the consequences of the jury's finding) which explain why a jury may be instructed to return a verdict of not guilty even though their doubts concerning the accused's story outweigh those concerning that of the prosecution. The jury's finding flies in the face of what reason would dictate,[40] were it not for considerations of public policy. The requirement of strict proof in criminal cases is, therefore, explained only in terms of the consequences of the fact found, it cannot be explained in terms of the nature of the *factum probandum*.[41] If, therefore, one is to accept the Court of Appeal's decision [42] that proof beyond reasonable doubt is to be required in some civil cases only,[43] it would seem to follow that the selection of such cases must depend upon the nature of the consequences and not upon the nature of the facts to be proved.

But Denning L.J. makes clear his opinion [44] that the selection of those cases which require proof beyond reasonable doubt depends on the nature of the facts in issue. There is no absolute standard proof. In civil cases ' the degree depends upon the subject-matter '

[39] I may reasonably believe there will be little traffic along my shortest route, but I may nevertheless behave rationally if I take a longer route in order to avoid the possibility of missing a train. Similarly, a jury may reasonably believe that an accused is probably guilty, but may nevertheless behave rationally if they return a verdict of not guilty in order to avoid the possibility of convicting an innocent man. The missing of the train and the consequences of convicting the accused are extraneous factors in assessing the probability of the facts in issue, but are all-important in a consideration of the rationality of conduct.

[40] ' That a man should afford his assent to that side on which the less probability appears to him, seems to me utterly impracticable ' (Locke, *Essay*, Bk. IV, c. 20, s. 15). The jury, therefore, by their verdict of not guilty may perpetrate a fiction.

[41] Lord Oaksey's dictum ([1951] 1 All E.R., at p. 133) that ' what is reasonable doubt . . . varies in practice according to the nature of the case and the punishment which may be awarded ' is true only in this sense.

[42] In *Bater* v. *Bater* [1950] 2 All E.R. 458.

[43] This is clearly envisaged by both Bucknill and Denning L.JJ.

[44] [1950] 2 All E.R. at p. 459.

and, although strict criminal proof is not required, it is necessary to establish ' a degree of probability which is commensurate with the occasion ', and ' likewise a divorce court should require a degree of probability which is proportionate to the subject-matter '. Hence, in civil actions fraud will naturally require a higher degree of probability than negligence, while in criminal cases, the proposition ' as the crime is enormous so ought the proof to be clear ' is to be read as a reference not only to the weight of the evidence required, but also to the standard of credence to be induced by it.[45] But it cannot be over-emphasised that the reasonableness of one's doubts depends on the antecedent improbability of the fact in issue when considered in conjunction with the weight of the evidence adduced; it cannot depend solely on ' the nature of the subject-matter '. The nature of the subject-matter is only one element to be considered in assessing the antecedent improbability. The maxim cited by the learned Lord Justice as being relied on ' by many great judges ' is one which indicates no more than that doubt is less easily dispelled in a serious than a trivial charge because of the greater antecedent improbability of the serious charge,[46] which, therefore, requires a greater amount of evidence to reach a balance of probability in its favour. Thus, the difference in degrees of antecedent improbability affects the quantity of evidence required to dispel reasonable doubt; it does not in any way affect the *standard* of proof to be achieved for this purpose.[47] The reasonableness of one's doubts will differ from case to case, not according to the nature of the facts to be established, but according to the antecedent improbability of these facts, relatively to the weight of evidence. Thus, the reasonableness of a doubt may differ as between a case of fraud and a case of negligence (as Denning L.J. remarks [48]); but it may also differ as between one case of fraud and another, and as between one case of negligence and another—and the difference will not arise exclusively out of the nature of the fact in issue per se. In a serious charge, one may have further to go to reach the goal of rational belief, but it is not natural (as Denning L.J. asserts it to be [48]) that that goal should itself recede into some standard higher than rational belief calls for.[49]

[45] The illogicality of this interpretation of the maxim has frequently been remarked on. The maxim does not relate to standards of proof; it is concerned with amounts of proof: see, *e.g.*, Wills on *Circumstantial Evidence* (7th ed.) c. 6, r. 5 (pp. 330–5).

[46] The ' plain reason ' for the maxim is ' that there is . . . an immense antecedent improbability to be got over and subdued by proof ' (Reporter's note to *R.* v. *White*, 4 F. & F. 383). But even this assumption is no more than generally true.

[47] The earliest writers appear to assume this: see, *e.g.*, Gilbert's *Law of Evidence* (6th ed., p. 133).

[48] In *Bater* v. *Bater* [1950] 2 All E.R. 458, 459. Indeed, the learned Lord Justice asserts that the reasonableness *will* differ, but this, it is submitted with respect, is logically inaccurate, though no doubt true of the vast majority of cases.

[49] ' A civil court, when considering a charge of fraud, will *naturally* require a higher degree of probability than that which it would require if considering

If, then, proof beyond reasonable doubt is a standard to be applied in some civil proceedings, and a selection of these proceedings is to be made, it would seem that that selection cannot be logically dictated by the subject-matter.[50] The selection will have to be made a matter of public policy dependent upon the consequences of the proceedings. The law has fixed its standards of proof in terms, not of rational belief, but of the ultimate consequences of acting upon the conclusions reached. It is this which explains the strict proof required in criminal cases (a measure of mercy thrown to the accused) and in legitimacy cases (for the protection of the family). Is there any such requirement of social policy in the Divorce Court? The present writer's suggestion [51] that the Divorce Court's arrogation to itself of ' a peculiar duty of protecting the sanctity of marriage ' [52] might alone explain the requirement that adultery be proved beyond reasonable doubt became untenable in the light of the Court of Appeal's decision in *Davis* v. *Davis*,[53] but it is submitted that the acceptance by the House of Lords [54] of requirement of some higher standard of proof for adultery was in justificatory terms which come within the phrase suggested above and which necessitate the extension of this requirement to all grounds of dissolution of marriage. It is submitted that the essence of the decision is to be found in Lord MacDermott's speech,[55] to the effect that the higher standard of proof is required by ' the public interest which requires that the marriage bond shall not be set aside lightly or without strict enquiry ', so that it would be ' out of keeping with the anxious nature ' of the statutory provisions to dissolve a marriage upon proof which was not beyond reasonable doubt. And although his Lordship rejected any analogy drawn from the criminal law, he concluded that the reason for the requirement of the higher standard was in each case to be found ' in the

whether negligence was established ' (p. 459). It is submitted with respect that there is nothing natural in requiring proof beyond reasonable doubt. Of the requirement of that standard in the criminal courts, it has been said that ' it is the substantive criminal law which fixes the amount of conviction to be obtained in the mind of the tribunal ' (Thayer, *Preliminary Treatise on the Law of Evidence* (1898) pp. 336–7).

[50] It is suggested by Denning L.J. that a degree of probability ' as low as 51 per cent. ' would be enough ' in some cases '. But, in judging between a fact and its contradictory, 51 per cent. probability must suffice for reasonable belief in *all* cases, though it might not suffice in a consideration of the action to be based on that belief. Even where a case will ' draw consequences of moment after it ', says Locke, ' the greater probability will determine the assent ' (*Essay*, Bk IV, c. 20, s. 16).

[51] 65 L.Q.R. 220.

[52] *Latey on Divorce*, 13th ed., p. 112 and the dicta there cited. Cf. *per* Bucknill L.J. in *Barker* v. *Barker* [1950] 1 All E.R. 812, to the effect that ' no one should regard a divorce petition as being in the same category as a writ of summons in a civil action ' (p. 813), for ' the State is an interested third party in a divorce petition. Its interest is to see that due regard is paid to the binding sanctity of marriage ' (p. 812). The functions of the judge in the Divorce Court cannot be said to be in accord with the accusatorial nature of common law proceedings: see, *e.g.*, 67 L.Q.R. 67, 78.

[53] [1950] P. 125; see 66 L.Q.R. 38.

[54] In *Preston-Jones* v. *Preston-Jones* [1951] 1 T.L.R. 8; [1951] 1 All E.R. 124.

[55] [1951] 1 T.L.R., at p. 23.

gravity and public importance of the issues '. If, however, it be thought that some such explanation will not suffice (or is considered unnecessary) to rationalise the requirement of the higher standard, there would appear to be no reason why a petitioner for divorce should not be entitled to a decree, upon establishing a 51 per cent. probability of his allegation (whatever it might be). If public policy, in the form of the requirement of some special protection to be afforded to the sanctity of marriage, does not intervene in the conflict between the parties,[56] why should not a petitioner for divorce be entitled in justice to ask the court to act upon its rational belief based upon the 51 per cent. probability of the story he has told? Why should the court act upon the respondent's improbable story, if public policy is indifferent in the matter? If, on the other hand, there is some principle of public policy requiring for proof of matrimonial offences something more than a mere balance of probability, if, that is, the requirement of the higher standard of proof is to be justified on the ground that it is necessary to prevent a too facile disruption of the marriage tie, it would seem inevitable that no distinction can be drawn between the standard of proof required for one ground of divorce [57] and that for any other.

It remains, therefore, to consider whether, after its decision in *Preston-Jones* v. *Preston-Jones*,[58] it is still open to the House of Lords to permit a petitioner to establish adultery by something less than proof beyond reasonable doubt. It will be admitted that, since their Lordships were expressly unanimous in their requirement of such a standard, clear reasons would be necessary to reject this conclusion as the ratio decidendi. In his learned note in 14 M.L.R. 225, Mr. Treitel advances two reasons. In the first place, he suggests that the negative conclusion that scientific certainty is not required does not entail the enunciation of any positive standard, so that proof beyond reasonable doubt is the highest, not the lowest, standard to be achieved. While this is strictly true, their Lordships appear nevertheless to have conceived the question at issue to be whether the petitioner's evidence reached the *minimum* standard required. Indeed, had they been concerned with the maximum

[56] It may be remarked, however, that in *Harriman* v. *Harriman* [1909] P. 123, Fletcher Moulton L.J. takes the distinction (at p. 142) between 'proved as a fact' and 'merely proved inter partes'. Thus a judgment inter partes founded on a court's acceptance of an allegation of cruelty is not binding on the Divorce Court, which may still be 'entitled and bound to require such additional evidence as should be sufficient to convince it of the fact'. It is submitted that the peculiar nature of the Divorce Court's decree affecting status can alone explain this conclusion; and the more recent cases upon the rule in *Harriman* v. *Harriman* appear to emphasise this point.

[57] Or nullity. In *Cooper* v. *Crane* [1891] P. 369, for example, it was said that the annulment of a marriage on the ground of lack of consent will be decreed only if clear and cogent evidence rebuts the presumption that the parties consented.

[58] [1951] 1 T.L.R. 8; [1951] 1 All E.R. 124.

standard, Lord Oaksey's dissent would be meaningless, for in his opinion the petitioner failed because his evidence did not establish adultery beyond reasonable doubt. Had his Lordship thought some lower standard sufficed, he could not have dissented from the majority for the reason stated. Similarly, if the other members of the House had considered it possible that adultery could be established on some lower standard, one would have expected it to be remarked that Lord Oaksey's dissent was not justified by the reason given for it. ' The question, as I see it ', said Lord Simonds (at p. 129) ' is whether the court ought to accept this evidence as adequate to justify a finding that beyond all reasonable doubt the child was not the child of the husband '.[59] But if such proof were not required as a minimum, this could not have been the question at issue. Mr. Treitel's second reason for rejecting the decision as conclusive upon the standard of proof of adultery is that the standard was here required, not by the allegation of adultery per se, but because of its consequence, *viz.*, that of bastardising the child. But although this consequence is referred to by their Lordships, there would appear to be no warrant for Mr. Treitel's suggestion that ' the unusually heavy burden ' placed upon the petitioner arose from the presumption of legitimacy, so that in the absence of such a presumption the burden of proof (to rebut a mere presumption of innocence) would be lighter. Indeed, in another connection, Lord MacDermott expressly rejects the contention that there is one standard of proof where a child's status is in issue and another where adultery simpliciter is to be established.[60] It is submitted that it would be safer to assume that it is no longer open to a petitioner to prove adultery at a standard lower than proof beyond reasonable doubt. But the decision still leaves open the question of the meaning of proof beyond reasonable doubt and its relation to criminal proof.

In the Australian case of *Wright* v. *Wright*,[61] Dixon J., in adopting a civil rather than a criminal standard of proof for matrimonial causes, suggested that ' the difference in effect is not so great as is sometimes represented '. Similarly, Bucknill L.J.[62] has referred to the question as a somewhat theoretical one and Denning L.J. has suggested [63] that ' the difference of opinion . . . may well turn out to be more a matter of words than anything else '. It may well be, however, that the parties in the cases cited above regard this dispute about ' a matter of words ' as anything but academic, since the appellate tribunal based its decision in

[59] It would appear that Lord MacDermott also saw this as ' the real issue ' (at p. 138).

[60] The absence of a requirement of scientific certainty ' is no less so in cases of adultery where the circumstances are such as to involve the paternity of the child ' (at p. 138); that is, the same standard applies whether the evidence bastardises the child or no.

[61] 77 C.L.R. 191, 210, cited in 66 L.Q.R. 37.

[62] In *Gower* v. *Gower* [1950] 1 All E.R. 804.

[63] In *Bater* v. *Bater* [1950] 2 All E.R. 458, 459.

their cases upon the correctness of the terms used by the judges who in the first instance tried to assess the probability of the stories they told. Terminology is here all-important. If, therefore, the Divorce Court is to borrow the term ' proof beyond reasonable doubt ' from the criminal courts, while denying any intention of imposing the strict standard of proof required in those courts, it would seem imperative that some new terminology be devised for the clearer delineation of the ' not too little and not too much ' which is thus required. It is not proposed here to speculate upon such improvements,[64] but it may be remarked that, even with a more precise terminology, the continued application of the term ' proof beyond reasonable doubt ' to cases other than criminal cases might still continue to cause difficulties—for example, in the nature of the direction to be given in those cases in which an accused has placed upon him the proof of some matter by way of defence.[65] The development of a more precise terminology, however, might leave the courts less open to Bentham's jibe [66]: ' Lawyers of the *Roman* school—lawyers of the *English* school—it will be seen into what awkward shifts—into what inadequate and uncharacteristic modes of expression they are driven—driven by their endeavour to give expression to *degrees of probability* without having recourse to numbers '.[67]

Conclusion

(1) The Court of Appeal has decided (i) that although (some) matrimonial offences may be established by proof which is not so strict as that required in a criminal court, such offences cannot be established except by proof beyond reasonable doubt; and (ii) that the determination of the cases which require this abnormally high standard must depend on the

[64] The present writer begs leave to take refuge in the suggestion in n. 35, *supra*, that, whatever the logic of the matter, it would be more convenient in practice to confine the term ' proof beyond reasonable doubt ' to criminal cases and those (*e.g.*, bastardy cases) which are expressly equated with criminal cases so far as concerns the standard of proof. Support may be found in *Lyons* v. *Lyons*, *supra*, where Andrews L.C.J. declares himself to be more anxious than the Court of Appeal appears to be ' to avoid a phraseology which lawyers have hitherto been in the habit of applying only to criminal cases '.

[65] See n. 11, *supra*. In *Preston-Jones* v. *Preston-Jones*, Lord Simonds is reported to have said that ' the utmost that a court of law could demand is that the fact in issue should be established beyond all reasonable doubt '. If this statement be related to courts generally, it is somewhat difficult to understand how proof in the Divorce Court differs from that in a criminal court. Lord Simonds' reliance on the further proposition that ' it was to him repugnant that a Court of Justice . . . should require evidence to displace fantastic suggestions ' is strongly reminiscent of Denning L.J.'s description of proof in criminal cases in *Miller* v. *Minister of Pensions* [1947] 2 All E.R. 372.

[66] *Rationale of Evidence, Preliminary View*, c. 6.

[67] Bentham had ' recourse to numbers ' because of the alleged " incapacity of ordinary language for expressing degrees of persuasion and probative force '. It is submitted that there is no incapacity of language, *i.e.*, essential vagueness, in this matter; there are only inconsistencies, *i.e.*, inessential vagueness. Though incapacity is not, inconsistency is, curable.

subject-matter of the proceedings. The House of Lords would appear to have accepted the requirement of proof beyond reasonable doubt for allegations of adultery.

(2) It is submitted (i) that in the only sense in which proof beyond reasonable doubt is applicable to some civil cases, it is applicable to all; but, (ii) that, if a selection of such cases is to be made, it should be in accordance, not with the nature of the respective facts in issue, but in accordance with the consequences of the judgments to be given; and (iii) such being the case, one ground of divorce cannot be distinguished from another, so far as concerns the minimum standard of proof required.

(3) It is further submitted that if some (civil) cases may be established by a preponderance of evidence, other (civil) cases require proof beyond reasonable doubt and other (criminal) cases demand a yet higher degree of proof, a recasting of terminology is an urgent necessity.

J. A. COUTTS.