Journal of Criminal Law and Criminology

Volume 25
Issue 1 *May-June*

Article 5

Summer 1934

Presumption of Innocence

John A. Seiff

THE PRESUMPTION OF INNOCENCE

JOHN A. SEIFF*

The patriots of 1776 declared, "All men are created equal."[1] The concentration of wealth in America and the different strata of society prove that this is an ideal but not real. Opposed to the rule of law "every accused is presumed to be innocent until he is proved guilty,"[2] we have the belief hammered home by actual experience "of 1,000 defendants, 1,000 are guilty or ought to be."[3]

Despite the presumptions in law of innocence,[4] honesty[5] and regularity,[6] the tendency is to cast a stone whenever an unfortunate is charged with the commission of an offense either against morals or the law. As in Biblical days, we hope that an omniscient being will save the innocent[7].

Often, in criminal cases, the state offers a verbal confession made to the arresting officer. With respect to these confessions, the highest court of Massachusetts said, "No cases require more careful scrutiny than those of disclosures made by a party under arrest to the officer who had him in custody."[8] The danger in confessions is that "The source of information is frequently polluted by the zeal of a police officer twisting every statement into proof of guilt."[9] Even written confessions of the commission of a crime are viewed with little credence by the courts, because of the notoriety of brutal third-degree methods.[10] Police officers have little patience with legal presumptions.

The presumption of innocence has been tersely codified in New York state:

"A defendant in a criminal action is presumed to be innocent, until

*Member of the New York Bar.

[1]Declaration of Independence, 1776.

[2]*Peo.* v. *Smith; Peo.* v. *Bonifacio; Peo.* v. *Trimarchi,* all *infra.*

[3]Common saying in criminal courts.

[4]*Peo.* v. *Roach,* 215 N. Y. 592, 109 N. E. 618, Ann. Cas. 1917-A, 410.

[5]*In re* Frazer, 92 N. Y. 239.

[6]16 C. J. 539; 22 C. J. 103-108.

For presumption in favor of legality: *Spaulding* v. *Arnold,* 125 N. Y. 194, 26 N. E. 295.

[7]Book of Daniel, vi. (Apocalyptic Literature).

[8]*Commonwealth* v. *Curtis,* 97 Mass. 574, 578.

[9]Chamberlayne, Modern Law of Evidence, sec. 1607.

See, also, *Peo.* v. *Moyer,* 186 App. Div. 278, 174 N. Y. Supp. 321.

[10]"Third Degree Methods," Case and Comment, v. 39, no. 1 (1933).

the contrary is proved; and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal."[11]

No definition of a reasonable doubt is given, although the statute provides that a defendant in a criminal case is entitled to an acquittal "in case of a reasonable doubt whether his guilt is satisfactorily shown."

Though the presumption of innocence appears to present little difficulty, its practical application is fraught with danger and complications arise in giving instructions to the jury, as is shown in the reversal by the Court of Appeals of a judgment affirming a conviction for arson in *People v. James O. Smith (1900)*.[12] The charge was that four members of a family entered into a conspiracy to defraud fire insurance companies. The trial court declined to charge the defendant's request,

"That before the jury can convict this defendant the evidence must be so strong as to remove every other hypothesis than that of the defendant's guilt.

The defendant duly took exception. The charge requested was clearly wrong, but the trial court continued,

"I charge that it must be sufficient to remove every reasonable hypothesis."

And exception was again taken.

The Court of Appeals, in reversing the judgment of conviction and ordering a new trial, stated:

"The request was not technically proper, since the rule is that the evidence must, to a moral certainty, or beyond a reasonable doubt, exclude or remove every other hypothesis than that of the defendant's guilt. But the qualification was improper, since it is difficult to conceive how any hypothesis of the defendant's innocence that remains reasonable under the evidence can be removed by it."[13]

A general discussion of proper instructions to the jury of the meaning and definition of a reasonable doubt or the rule of the presumption of innocence, though interesting, would be of problematical value. The expressions of the highest courts of New York will, therefore, be given and discussed. The rule itself must be known so that it may be properly evaluated, and its relevancy to novel situations or the ingenious artifices of trial counsel be appreciated in an instant, for the rule comes into play not by way of

[11]Code of Crim. Proc., sec. 389.
[12]162 N. Y. 520; 56 N. E. 1001, revg. 37 A. D. 280.
[13]162 N. Y. 529.

pleading, but in the actual engagement of the most fascinating of trials—a criminal prosecution.

When the jury weighs the evidence, they must place in the scale of the defendant the presumption of his innocence.[14] A defendant should not be guessed into a conviction. Merely because a conviction will solve a mystery is no reason for finding the defendant guilty[15], and neither is it enough that the hypothesis of guilt will account for all the facts proven[16].

In *People v. John B. Erit (1932)*,[17] a prosecution for grand larceny in the first degree, the court cited as authority for reversing the conviction in the Court of General Sessions *People v. Carmello Trimarchi (1921)*,[18] quoting:

"'The rule is that all the evidence, when considered by the jury, must, beyond a reasonable doubt, exclude or remove every other reasonable hypothesis than that of the defendant's guilt. * * * The evidence of facts and circumstances, in order to justify a conviction, must all be consistent with and point not only to the guilt of the defendant, but they must be inconsistent with his innocence.'"

In *People v. Mantin (1918)*,[19] the defendant was convicted under section 405[20] of the Penal Law for entering a loft building in the Borough of Manhattan, City of New York, on a Sunday morning. He did not take the stand. No weapons were found on him at the time of the arrest. He had previously served sentences for larceny. In reversing the conviction, the appellate court stated,

"The defendant is entitled to the statutory presumption of innocence until his guilt is established beyond a reasonable doubt (Code Crim. Proc. sec. 389), and his failure to testify does not create any presumption against him. (Code Crim. Pros., sec. 393). He is also entitled to the benefit of the general rule that the evidence must exclude to a moral certainty every reasonable hypothesis of innocence and that the facts proved must be inconsistent with innocence and that an inference of guilt must be the only inference that can reasonably be drawn therefrom . . ."[21]

[14]*Peo.* v. *Moyer* (1919) 174 N. Y. Supp. 321, 186 App. Div. 278, at 285; 37 N. Y. Crim. 379, at 387.

[15]*Peo.* v. *Herman Glickman* (1914) 164 App. Div. (2d Dept.) 38, 149 N. Y. Supp. 297.

[16]*Peo.* v. *Josef Razezicz* (1912) 206 N. Y. 249, 99 N. E. 557, 28 N. Y. Crim. 254.

[17]237 App. Div. (1st Dept.) 35, 260 N. Y. Supp. 638.

[18]231 N. Y. 263, 131 N. E. 910, revg. 193 App. Div. 968.

[19]184 A. D. 767, 172 N. Y. Supp. 371, 37 N. Y. Crim. 146.

[20]"A person who, under circumstances or in a manner not amounting to a burglary, enters a building, or any part thereof, with intent to commit a felony or a larceny, or any malicious mischief, is guilty of a misdemeanor."

[21]184 App. Div. 767, 770; 37 N. Y. Crim. 146, 149.

In the sensational murder trial of *People v. Bonifacio (1907)*,[22] the highest court of New York stated,

"Proof 'beyond a reasonable doubt' has been well defined to be that which amounts to a moral certainty, as distinguished from an absolute certainty. (Common. v. Costley, 118 Mass. 1.) * * *

"The law deals rather in considerations of a moral nature and does not demand absolute certainty; it demands that the evidence shall establish the truth of the fact charged to a reasonable and moral certainty; that is to say, a certainty which results from the reason being convinced and from the judgment being satisfied. If, after a careful and impartial consideration and comparison of the evidence, the jurors can say that they entertain no reasonable doubt of the defendant's guilt and, therefore, are convinced of it, the requirements of the law will be satisfied."[23]

In *People v. John Henry Barker (1897)*,[24] the defendant, a colored man, was convicted for shooting to death without provocation his wife who had borne him nine children. The Court of Appeals sustained the following definition of a reasonable doubt by the trial judge:

"A reasonable doubt, gentlemen, is not a mere whim, guess or surmise; nor is it a mere subterfuse to which resort may be had in order to avoid doing a disagreeable thing; but it is such a doubt as reasonable men may entertain, after a careful and honest review and consideration of the evidence of the case."[25]

Again,

"Such a doubt is not a mere guess or surmise that the man may not be guilty; it is such a doubt as a reasonable man might entertain after a fair review and consideration of the evidence."[26]

A request "that the evidence in this case must be, in order to convict, of such a character as to exclude every hypothesis except this defendant's guilt" is improper. "The rule is that all the evidence, when considered by the jury, must, beyond a reasonable doubt, exclude or remove every other reasonable hypothesis than that of the defendant's guilt."[27]

[22]190 N. Y. 150, 82 N. Y. 1098, 21 N. Y. Crim. 527, affirming 119 App. Div, 719, 104 N. Y. Supp. 181, 21 N. Y. Crim. 122.

[23]190 N. Y. 150, 153-155.

[24]153 N. Y. 111, 47 N. E. 31.

[25]153 N. Y. 111, 115.

[26]*Peo.* v. *Friedland*, 2 App. Div. 332, 335; 11 N. Y. Crim. 62, 66.

[27]*Peo.* v. *Trimarchi*, 231 N. Y. 263, 267.

See, also, *Peo.* v. *Bonifacio, supra*, where the trial court refused to charge "that unless the evidence on both sides as a whole excludes every hypothesis except that of guilt, the defendant may be acquitted." and stated, "I decline to charge in that way. You leave out the word 'reasonable'." The Court of Appeals held that the charge requested was erroneous because it called for

The refusal of the trial court to charge in a murder case that "if this jury is in doubt as to what actually happened in that room (meaning a room in the house where the homicide was committed), that they must bring in a verdict of not guilty" was upheld, for

"This request was not limited to a reasonable doubt, but included any doubt, however slight, which the jury might have as to the most trivial act or circumstance that occurred there. The effect of establishing such a rule would be to require the People in every criminal case to submit proof that would establish, to an absolute certainty, all the ingredients of the crime before a conviction could be had, and would exclude circumstantial evidence altogether."[28]

Under the charge requested circumstantial evidence would be excluded because any fact dependent upon logic and deduction[29] is capable of distortion or subject to the imagination, at least to the extent of precluding proof to an absolute certainty.

In *People v. Howard C. Benham (1899),*[30] the defendant was charged with the murder of his twenty-year old wife by poisoning her with prussic acid. "Before submitting the case to the jury, defendant's counsel handed to the court a number of written requests to charge. Some of these requests required facts to be established by evidence equivalent to 'absolute and positive proof.' Other requests were to the effect that if there be 'any doubt', whether it amounted to a reasonable doubt or not, the jury should acquit. . . . These requests were uncalled for and the court properly refused to charge them. (*Poole v. People,* 80 N. Y. 645; *People v. Owens,* 148 N. Y. 651)."[31]

The trial court in defining a reasonable doubt stated:

"It is not a mere guess or surmise that the man may not be guilty; it is such a doubt as a reasonable man might entertain after a fair review and consideration of the evidence—a doubt for which some good reason arising from the evidence can be given."

The Court of Appeals, in review, stated:

"The criticism is limited to the definition given of a reasonable doubt; and aimed at the portion where, by way of paraphrase, the trial judge said, 'a doubt for which some good reason arising from the evidence can

an absolute certainty. See, *Peo.* v. *Henry Reiss* (1906) 114 A. D. 431, 99 N. Y. Supp. 1002, 20 N. Y. Crim. 285.

[28]*Peo.* v. *Nelson Boggiano* (1904), 179 N. Y. 267, 270; 72 N. E. 101; 18 N. Y. Crim. 509, 513.

[29]*Peo.* v. *Kennedy,* 32 N. Y. 141; *State* v. *McLennan,* 40 Idaho 286, 231 P. 718, 723.

[30]160 N. Y. 402, 55 N. E. 11, 14 N. Y. Crim. 188.

[31]160 N. Y., 444; 14 N. Y. Crim., 224

be given." It should be read with the whole sentence of which it forms a part, and, so taken, seems only to distinguish that doubt which would avail a prisoner from one which is merely vague and imaginary."[32]

The requirement of the court that the jury must be able to give a good or any reason for the doubt is too broad and a reasonable doubt exists, it is submitted, where there is a failure to convince the reason or judgment, even though the juror is not able to analyze his judgment and feelings.[33] The appellate court seems to realize this because it bases its decision upon the rest of the sentence. The objectionable portion, however, is not properly a part of the sentence, but is merely tacked on and governs or supersedes what went before. As limited by the Court of Appeals to exclude vague or imaginary doubts, no exception can be taken.[34]

However, the charge that "A reasonable doubt is such a doubt as a man of reasonable intelligence can give some good reason for entertaining if he is called upon to do so," was later approved.[35]

In defining the presumption of innocence and the doctrine of reasonable doubt, the danger lies in elaboration. "Attempts at definition are more apt to be confusing than helpful, when the term attempted to be defined is, in itself, neither abstrusely expressed, nor being expressed in ordinary language, is difficult of understanding."[36] A theorem in geometry may be proven, but not a rule of law founded upon human experience and social justice. A scientifically exact and correct definition is a logical impossibility. Refinements will bewilder rather than enlighten.[37]

The danger of elaboration in an effort to help the jury is shown in *People v. John T. Stephenson (1895)*[38] where the defendant, a

[32]*Peo.* v. *Guidici* (1885), 100 N. Y. 503, 509; 3 N. E. 493, 3 N. Y. Crim. 551, 559.

[33]Wharton Crim. Ev., 8th ed., sec. 1.

[34]100 N. Y., at 510: "An undefinable doubt, which cannot be stated, with the reason upon which it rests, so that it may be examined and discussed, can hardly be considered a reasonable doubt, as such a one would render the administration of justice impracticable, and as to this it has not been too strongly said, 'all the authorities agree.' Note to section 29, vol. 3, Greenleaf on Evidence, 14 ed."

[35]*Peo.* v. *Lagroppo* (1903), 90 App. Div. (1st Dept.) 219, 86 N. Y. Supp. 116; aff. 179 N. Y. 126, 71 N. E. 737.

[36]*Peo.* v. *Bonifacio*, 190 N. Y. 150, 156; 21 N. Y. Crim. 527, 533.

[37]This is illustrated in the involved but useless controversy as to whether a reasonable doubt is a doubt which would influence action in private affairs. This test was approved in: *Peo.* v. *Friedland*, 2 App. Div. (1st Dept.) 332, 336; 11 N. Y. Crim. 62, 67; *Peo.* v. *James Hughes* (1893) 137 N. Y. 29, 32 N. E. 1105, 9 N. Y. Crim. 277; and disapproved in: *Peo.* v. *Montlake*, 184 App. Div. (2d Dept.) 578, 584; 37 N. Y. Crim. 132, 138; and *Peo.* v. *Matthew Johnson* (1893) 140 N. Y. 350, 355; 35 N. E. 604; 11 N. Y. Crim. 1, 5.

[38]11 Misc. 141, 9 N. Y. Crim. 485.

police captain, was convicted of being bribed by two baskets of peaches; "* * * the learned trial judge correctly told the jury that the guilt of the defendant had to be established beyond a reasonable doubt, and he then added:

"'That does not mean beyond all doubt. It does not mean that it shall be conclusively established. It means a higher order of proof than a mere preponderance of the evidence. It must be more specific than a mere preponderance of the evidence.'

"And then he added, in conclusion:

"'You must be in such a frame of mind that (after considering all of the evidence and circumstances) you can say that your reason is satisfied; that there is no reasonable doubt; not that you are evenly divided, not that you think it possible that it is so, but that there is such a reasonable certainty that you can say that this defendant is guilty.'"[39]

This charge was held to be erroneous. The court erred in charging that the presumption of innocence does not mean that the guilt of the defendant "shall be conclusively established", because

"Not only must the guilt of the defendant follow as the only conclusion of reason before a conviction may be had, but, in addition to that, if a reasonable doubt follow, a conviction cannot be had; so that beyond a reasonable doubt seems to be even stronger than conclusively."[40]

The statements that reasonable doubt "means a higher order of proof than a mere preponderance of the evidence" and "must be more specific than a mere preponderance of evidence" may have tended to confuse the jury and, therefore, likewise constituted reversible error. Another error in the charge is the statement that the jury might find the defendant guilty if "there is such a reasonable certainty that you can say this defendant is guilty," for although

"In a civil action it is enough that the jury be reasonably certain, by reason of a preponderance of evidence, which does not mean that they must have no reasonable doubt, no doubt founded in reason. But in a criminal action the jury may not convict because on the whole they are reasonably certain of guilt. On the contrary, to convict, they must be without a reasonable doubt, even though there be a clear preponderance of evidence on the side of guilt."

The rule must be preserved in its full strength. Elaborations, refinements and explanations weaken it.[41]

An able magistrate who tries thousands of petty offenders a

[39]11 Misc., 142.

[40]11 Misc. 141, 143.

[41]*Mitchel C. Perara* v. *U. S.*, 149 C. C. A. 61, 235 Fed. 515, 10 A. L. R. 1 and lengthy annotation reviewing decisions in all states.

year sums up the rule as follows: "The evidence must be not only consistent with guilt but inconsistent with innocence."[42]

The nationally prominent district attorney Samuel J. Foley states, "the natural reluctance of citizens to convict is not a reasonable doubt."[43]

The presumption of innocence extends to each and every item of proof during the course of the trial. Every reasonable doubt as to each point in the People's case must be resolved in favor of the defendant.[44]

In civil cases, the burden of proof of affirmative defenses is upon the party offering the same. The rule is different in criminal cases. In *People v. Montlake,* the following charge was held reversible error,

> "In regard to the proof of an alibi, unless you are satisfied that the defendants could not have been at the place where the crime was alleged to have taken place at the time it is alleged to have taken place, then you cannot say that the alibi is sustained."[45]

The rule in criminal cases that the defendant is entitled to the benefit of a reasonable doubt applies not only to the case as made by the prosecution, but to any defense interposed.[46]

Character evidence is always admissible to raise a reasonable doubt.[47] It is written in the Koran, "Should any man tell you that a mountain had changed its place, you are at liberty to doubt it if you think fit; but if any one tells you that a man has changed his character, do not believe it."

The Court of Appeals stated the logical basis for the admissibility of character evidence to be "* * * the improbability, as a general rule, as proved by common observation and experience, that a person who has uniformly pursued an honest and upright course of

[42]Richard F. McKiniry, Magistrate, City of New York, to author.

[43]District Attorney, Bronx County, to author.

[44]*Peo.* v. *Montlake,* 184 App. Div. (2d Dept.) 578; *Peo.* v. *Allocca,* 183 App. Div. 571. Contra: Illinois (leading case, *Jamison* v. *People* (1893) 145 Ill. 357, 380, 34 N. E. 486), and Indiana, Montana, Nebraska, and Wyoming. "Herein is given opportunity for much vain argument whether the strands of a cable or the links of a chain furnish the better simile for testing the measure of persuasion." Wigmore on Evidence, 1905 ed., sec. 2498, p. 3545.

[45]184 App. Div. (2d Dept.), at 584.

[46]*Peo.* v. *Riordan,* 117 N. Y. 73; *Peo.* v. *Downs,* 56 Hun. 11, 7 N. Y. Crim. 481; *Peo.* v. *Guidici,* 100 N. Y. 503, 3 N. Y. Crim. 558; *Peo.* v. *Reavy,* 38 Hun. 428.

Insanity: *Peo.* v. *Coleman,* 1 N. Y. Crim. 5; *Walker* v. *Peo.,* 1 N. Y. Crim. 7, 22.

Self-defense: *Peo.* v. *Cantor,* 71 App. Div. 185; *Peo.* v. *Lagroppo, supra;* Matter of Lumsden, *supra.*

[47]*Peo.* v. *Bonier,* 179 N. Y. 315, and cases *infra.*

conduct will depart from it and do an act so inconsistent with it. Such a person may be overcome by temptation and fall into crime, and cases of that kind often occur, but they are exceptions; the general rule is otherwise."[48]

Moreover,

"An innocent man may be so surrounded by adverse circumstances that his only reliance is his naked denial, which ordinarily has but little weight, and proof of good character, which may have great weight."[49]

Evidence of good character is not "* * * a specific defense, such as justification or excuse might be, but, as it might create a reasonable doubt, even if the evidence were otherwise conclusive, the jury should consider it with all the other evidence in order to decide whether the defendant was guilty beyond a reasonable doubt."[50]

In *People v. George Conrow (1911)*,[51] the trial court charged the jury,

"* * * evidence of previous good character is always proper, and is always to be considered by the jury along with the other evidence in a criminal case, and where the questions of fact are sharply contested and the case is close, evidence of good character may of itself create a reasonable doubt as to the defendant's guilt, so the courts have held. But where the evidence satisfactorily establishes the guilt of the defendant beyond a reasonable doubt that the crime has been made out, then the evidence of previous good character is of no avail to save a man from the consequences of his act. In other words, a man cannot commit his first crime and then come into court and ask to be excused because up to that time he has always lived an exemplary life. Evidence of good character is only to be considered as it may bear upon the question of his credibility and as it may tend to create a reasonable doubt in your minds on the question of his guilt."[52]

The charge contains many errors. Evidence of good character may create a reasonable doubt not only in cases where the "case is close" but also in cases where the proof appears to be conclusive. Evidence of good character is to be considered before the jury reaches a conclusion as to guilt, and not after "the evidence satisfactorily establishes the guilt of the defendant beyond a reasonable doubt."

[48] *Cancemi* v. *Peo.*, 16 N. Y. 501, 506; quoted with approval in *Peo.* v. *Bonier*, 179 N. Y. 315, 318.

[49] *Peo.* v. *Bonier*, 179 N. Y. 315, 322.

[50] *Peo.* v. *Gilbert*, 199 N. Y. 10, 29; cited and quoted with approval, *Peo.* v. *Conrow*, 200 N. Y. 356, 361.

[51] 200 N. Y. 356, 93 N. E. 943, 25 N. Y. Crim. 324.

[52] For qualification and competency of character witnesses, see leading case of *Peo.* v. *Van Gaasbeck* (1907) 129 N. Y. 408, 82 N. E. 718, 22 L. R. A. (N. S.) 650, 21 N. Y. Crim. 460, affirming 118 App. Div. (3d Dept.) 511, 21 N. Y. Crim. 70.

The purpose of offering evidence as to good character is not to furnish an "excuse", as the trial court stated, but to raise a reasonable doubt. Evidence of good character in a criminal case is to be considered by itself and not as part of anything else, or as merely bearing upon the question of credibility. Evidence of good character is not to be considered "as it may tend to create a reasonable doubt * * * on the question of guilt. The Court of Appeals in reversing the conviction for murder for these errors quoted with approval from *People v. Monier,*[53]

"'It is, therefore, the law that evidence of good character may of itself create a reasonable doubt, when without it none would exist, and that upon the request of the accused the jury should be told that such evidence, in the exercise of their sound judgment, may be sufficient to warrant an acquittal, even if the rest of the evidence should otherwise appear to be conclusive.' (p. 321)."

The jurors are entitled to give evidence of good character whatever weight they think it deserves, and must weigh the evidence of good character the same as the other evidence in the case.[54] The court must not attempt to influence the jury. In *People v. Bonier,* supra, the Court of Appeals stated that in an early case in this state the following statement in a charge to the jury in a murder case led to a reversal because it "tended to control the weight of the evidence and was calculated to mislead the jury as to the effect which it might receive."[55]

"Where the question was one of great and atrocious criminality, evidence of good character, and of a man's habitual conduct under common circumstances, must be considered far inferior to what it is in the instances of a lower grade; but still, even with regard to the higher crimes, testimony of good character, even of less avail, was competent."[56]

In *People v. Jackson* (1905),[57] the defendant, a negro, was convicted of murder in the first degree. The defendant was found guilty of having followed the decedent who was accompanying his companion to her home, waylaid them, smashed the decedent's skull in with a club and then robbed him. The Court of Appeals held that there was no limitation of the rule that evidence of good character

[53]179 N. Y., at 321.

[54]*Peo.* v. *Henry H. Fisher* (1909) 136 App. Div. 57, 59; 24 N. Y. Crim. 171, 173.

[55]179 N. Y. 315, 318; the case referred to by the Court of Appeals is *Cancemi* v. *Peo.* (1858) 16 N. Y. 501. See, also, *Remsen* v. *Peo.,* 43 N. Y. 6.

[56]It is interesting to note that this objectionable portion of the charge was taken from the celebrated charge of Chief Justice Shaw of Mass. in the trial of Dr. Webster, 5 Cush. (1850) 295, 325.

[57]182 N. Y. 66; 74 N. Y. 565.

may, of itself, create a reasonable doubt[58] when in response to a request so to charge the trial court stated:

"I so charge. And, in relation to that, you can give such testimony that consideration that you think it is entitled to, and no more, taking it into consideration with all the other facts and circumstances of the case."[59]

In *Remsen v. People* (1870)[60] the trial court in his charge to the jury in a grand larceny case attempted to limit the effect of proof of good character to doubtful cases. The Court of Appeals reversed the judgment of conviction and ordered a new trial on the ground that this limitation was clearly erroneous and calculated to mislead the jury to the prejudice of the defendant, for

"There is no case in which the jury may not, in the exercise of a sound judgment, give a prisoner the benefit of a previous good character. * * * An individual accused of crime is entitled to have it left to the jury to form their conclusion upon all the evidence whether he, if his character was previously unblemished, has or has not committed the particular crime alleged against him. (2 Russ. on Crimes, 785.) The weight of the evidence is for the jury alone to determine. (3 Greenl. of Ev., sec. 25)."[61]

Evidence of good character in itself may be sufficient to create a reasonable doubt.[62]

In *People v. Abraham S. Friedland (1896)*,[63] the judgment convicting the defendant of receiving stolen goods was reversed and a new trial ordered because the charge limited the operation of the presumption of innocence arising from evidence of previous good character to those cases where there was conflicting evidence which might produce a reasonable doubt. This was erroneous because the jury may find a reasonable doubt from proof of good character even though the proof of guilt appears to be conclusive and there is no conflicting evidence, no defense except the unsupported plea of the defendant that he is innocent.[64]

---

[58]*Peo.* v. *Elliott* (1900) 163 N. Y. 11, 57 N. E. 103, cited and approved in *Peo.* v. *Bonier*, 179 N. Y. 315, 321. This was a prosecution for rape upon the defendant's own daughter, 13 years old.

[59]This case is important also for discussion of presumptions in favor of guilt. See, also, *Peo.* v. *Wm. M. Creasy* (1923) 236 N. Y. 205, 223; and case cited, 182 N. Y. 66, at p. 78.

[60]43 N. Y. 6, 1 Cow. Crim. Rep. 280.

[61]43 N. Y. 6, 8; quoted and approved in *Peo.* v. *Bonier*, 179 N. Y. 315, 320, and in *Peo.* v. *Clements*, 42 Hun 353, 356.

[62]*Peo.* v. *Lewis M. Roach* (1915) 215 N. Y. 592, 109 N. E. 618; *Peo.* v. *Meyer Koppmann* (1913) 158 App. Div. (1st Dept.) 660, 143 N. Y. Supp. 919.

[63]2 App. Div. (1st Dept.) 332, 37 N. Y. Supp. 974, 11 N. Y. Crim. 62.

[64]*Peo.* v. *De Graff*, 44 Hun 622 (not reported), 5 N. Y. Crim. 561, 568; *Peo.* v. *Rachel Brook*, 131 N. Y. 321, 30 N. E. 189, 10 N. Y. Crim. 132.

In the final analysis, the reasonable doubt which will entitle the defendant to an acquittal is a question addressed to the judgment and conscience of each individual juror.[65] No juror should agree to a verdict of guilty unless he is convinced of the defendant's guilt beyond a reasonable doubt, and he must be convinced of that, not upon suspicion, not upon conjecture, not upon belief, but upon the evidence and the evidence alone. The better practice is not to attempt to define a reasonable doubt but to instruct in the language of the Code.[66] As Wigmore states, "In practice, detailed amplifications of the doctrine have usually degenerated into a mere tool for counsel who desire to entrap an unwary judge into forgetfulness of some obscure precedent, or to save a cause for a new trial by quibbling, on appeal, over the verbal propriety of a form of words uttered or declined to be uttered by the judge."[67]

[65]*Peo.* v. *Kerr*, 6 N. Y. Crim. 406, 458.
[66]*Williams* v. *Com.*, 80 Ky. 313; *U. S.* v. *Hopkins*, 26 Fed. 443.
[67]Wigmore on Evidence, 1905 ed., sec. 2497, at p. 3544.