Another suggestion contained in this paper which we do not remember to have seen expressed elsewhere is, that the true way to render an appellate tribunal attractive to the more eminent minds among the profession, and to give to its incumbents fair opportunities for complete development, is to relieve it of the necessity of trying insignificant cases of no merit and of but little interest, in consequence of the principles involved, and thus enable it to devote its time and attention to the careful elucidation of the cases of real importance which come before it. This object, he thinks, will, in a measure, be accomplished by the establishment of the pecuniary limit to the right of appeal.

INSANITY—BURDEN OF PROOF.

The defense interposed in the Guiteau case has served to direct attention to the law of insanity in criminal cases, to an extent hitherto unknown. The acquittal of Sickles in the District of Columbia, and of Cole, and of McFarland in New York, served to create a public sentiment which has been constantly growing, and which, looking upon the defense of insanity as a "dodge," demands that the law shall be strictly construed, and so rigid a rule laid down as shall make it impossible that such a defense should be successful, unless the prisoner was unquestionably insane. The danger is, that in laying down the rule so rigidly, the actually insane may be unjustly convicted. Such a result is to be avoided, unless we are prepared to act upon the theory advanced by some, that a murderer should be executed whether he be sane or insane. We do not believe that such a theory will find favor to any extent. "Without reference to sentiment or ideas of duty," as an eminent gentleman recently said, "or to any philosophical reasoning whatever, it is practically impossible for a civilized nation to deliberately and consistently inflict the highest punishment of responsible crime on irresponsible lunatics, or to shoot them down as wild bulls running through the streets; for to do this we must ourselves first become rebarbarized; the weapon of our defense would burst in our hands—we should destroy our civilization in the very effort to save it." 2 If, then, in the interest of justice and civilization, the extreme penalty of the law is not to be visited upon the insane criminal, several questions of great interest arise: What shall be done with him? What shall be the test of responsibility? Shall the burden of proof of insanity rest upon him, or upon the prosecution? It is to the last of these inquiries that we direct attention. Upon this question, as is well known, different theories prevail, and we propose to present the rulings upon the subject in the courts of the several States, for the purpose of ascertaining just how the matter stands at the present time.

I. The first theory to be noticed is that which holds that the burden of proof rests in such cases upon the prisoner. And this theory is the one adopted in the following States:

In Alabama it was recognized in 1850, in McAllister v. State,3 and in 1880, in Boswell v. State,4 it was reaffirmed after careful argument and exhaustive consideration. In this last case insanity is said to be "a defense which must be proved to the satisfaction of the jury by that measure of proof which is required in civil causes, and a reasonable doubt of sanity raised by all the evidence does not authorize an acquittal." 5

In Arkansas it was adopted in 1870, in McKenzie v. State,5 where the question is briefly considered, and the opinion expressed that the prisoner must produce evidence sufficient to change the presumption of his sanity. No authorities are cited by the court.

In California this doctrine was adopted in 1862, in People v. Myers,6 where the court declared that the prisoner must produce evidence sufficient to change the presumption of his sanity. No authorities are cited by the court.

In 1882, in People v. Myers,6 where the court declared that the prisoner must establish his defense of insanity, and that he must establish it by a preponderance of evidence, not merely by raising a doubt in the minds of the jury. This doctrine has been reaffirmed in a number of cases, the last of which was decided in September, 1881.7

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1 This view is advocated by Dr. Elwell, a distinguished writer on Medical Jurisprudence in the North American Review, for January, 1882.

2 Ibid. Dr. George M. Beard's article.
3 17 Ala. 436.
4 63 Ala. 307.
5 26 Ark. 351, 361.
6 20 Cal. 515.
7 7 People v. Coffman, 24 Cal. 238; People v. McDonnell, 47 Cal. 184; People v. Wilson, 49 Cal. 14; People v. Wreden, 12 Reporter, 682.
In Connecticut the subject was briefly considered in State v. Hoyt, decided in 1878. No authorities were cited for or against the conclusion reached. The subject was thus summarily disposed of: "The accused introduced a witness, an expert, upon the point of insanity, and the court permitted an expert to testify upon the same subject in behalf of the State by way of rebuttal. The accused complains of this, and urges that the State should have introduced this evidence in chief. The complaint is without foundation. The accused should have introduced this evidence in chief.

The accused introduced a witness, an expert, upon the point of insanity, and the court permitted an expert to testify upon the same subject in behalf of the State by way of rebuttal. The accused complains of this, and urges that the State should have introduced this evidence in chief. The complaint is without foundation. The law presumes every person of mature years to be of sound mind and competent to commit crime. If the defense be insanity, it is to be proved substantially as an independent fact, and the burden of proof is on the accused. Upon this issue he goes forward and the State rebuts."

In Delaware the matter has been under consideration in a number of cases, and the same conclusion reached in all. The prisoner is bound to prove his insanity, and must prove it beyond a reasonable doubt. In Georgia the subject was considered in 1872. The jury had been charged that the defense of insanity must have been proven to their satisfaction, or they were bound to discredit it. The Supreme Court said, in reference to this instruction: "Prima facie, all persons are to be considered sane; and this is true in criminal as well as civil trials. If this be the legal presumption, it would seem to follow that unless the jury are satisfied of insanity, they must consider the prisoner sane. Perhaps the word satisfied is rather strong; and were there any evidence here of insanity, we might hesitate to sustain the judge."

In Iowa the question was settled in State v. Felter, decided in 1871, in which the court held that insanity was an affirmative defense, and that the prisoner must make it appear by a preponderance of evidence. An instruction was sustained which informed the jury that it was unnecessary that they be satisfied beyond all reasonable doubt, and that it was sufficient to justify an acquittal that they were reasonably satisfied, upon a consideration of the whole testimony, of the prisoner's insanity.

In Kentucky, too, the burden of proof is on the prisoner. It is there held, however, to be insufficient that the evidence merely raises a doubt as to the prisoner's mental soundness, for the reason that this would be repelling a legal presumption by evidence raising a mere doubt or suspicion as to the mental condition. In such a case the legal presumption would amount to little, if to anything at all.

In Maine the question underwent very careful examination in State v. Lawrence, decided in 1870, and the opinion of the court is among the ablest of those holding the burden to be upon the prisoner, and is well worthy of great consideration. "It is undoubtedly true," said the court, "that there can be no guilt except as the result of the action of a sound mind, there can be no crime except there be a criminal; nevertheless there is a palpable distinction between these two; one can not exist without the other, still they are two and not one and the same. The person doing the act is not the act itself. He may or may not be responsible for the act; but in no sense can he be the act." The court goes on to say that the defense of insanity is a plea of confession and avoidance. It does not meet any question propounded by the indictment, but raises one outside of it. It is not a denial, but a positive allegation, and the prisoner assumes the affirmative, changing the issue. The presumption of sanity continues until removed by a preponderance of the evidence. "Does it not," asks the court, "and must it not necessarily still stand, though we may have some doubts of its truth? That which exists is not destroyed simply because it may be enveloped in a thin cloud. However we may theorize, it will still exist until demolished. If this presumption is to be overthrown by a doubt, as well might it be abolished at once."

In Massachusetts Chief Justice Shaw declared in the noted case of Commonwealth v. Rogers, decided in 1844, that, in order to shield a prisoner from criminal responsibility, the presumption of his sanity must be rebutted by proof of the contrary satisfactory to
the jury. And he added that if a preponderance of evidence was in favor of insanity, the jury would be authorized to acquit the prisoner. Again, in 1856, in Commonwealth v. Eddy, the court declared that the burden of proof was on the State to prove the sanity of defendant, but that the burden was sustained by the presumption of law that all men are sane, until it was rebutted and overcome by satisfactory evidence to the contrary. And this doctrine has since been adhered to.

In Minnesota it was settled as early as 1858, that the burden of proof as to insanity rested on the prisoner. The New York case of People v. McCann, holding a contrary doctrine, was said to be controverted by the weight of authority, and was expressly repudiated as not being the safer and better rule. This doctrine is still followed.

In Missouri this subject has been considered in a number of cases, in all of which it is agreed that it rests on the prisoner to prove his insanity. The question was considered as early as 1848, when the court sustained the following instruction: "This defense is emphatically one which the defendant must make out to the satisfaction of your minds. For if the evidence merely shows a case of doubt, where the defendant might or might not be insane, this is not sufficient to authorize an acquittal. • • • • The evidence must show satisfactorily to your minds that he was insane at the time of the commission of the act." This was afterwards adhered to in State v. Hutting, decided in 1855, when the court held that a prisoner was not entitled to the benefit of a reasonable doubt as to his sanity. But in 1868, in State v. Klinger, while the doctrine was sustained that the burden rested on the prisoner, the court receded from its former position, that it was necessary that the defense of insanity should be made out beyond a reasonable doubt, and held it to be sufficient if made out by a preponderance of the evidence, and to the reasonable satisfaction of the jury. And in 1873 this doctrine was affirmed in State v. Smith, and again in 1880, in State v. Redemeier. The majority of the court in the case last cited were of the opinion that the wisdom of the rule was demonstrated by the ease with which insanity could be simulated, and that it was necessary for the protection of society.

In New Jersey it was held in State v. Spencer, decided in 1846, that where the evidence left the question of insanity in doubt, the jury must find against the prisoner, for the reason that every man was to be presumed sane until the contrary was clearly proven. "When the evidence," so it was said, "of sanity on the one side, and of insanity on the other, leaves the scale in equal balance, or so nearly poised that the jury have a reasonable doubt of his insanity, then a man is to be considered sane and responsible for what he does. But if the probability of his being insane at the time is, from the evidence in the case, very strong, and there is but a slight doubt of it, then the jury would have a right, and ought to say, that the evidence of his insanity was clear. The proof of insanity at the time of committing the act ought to be as clear and satisfactory, in order to acquit him on the ground of insanity, as the proof of committing the act ought to be, in order to find a sane man guilty."

In North Carolina the matter was considered and summarily disposed of in Morehead v. Brown, where it was held that the prisoner was to be considered sane until the contrary was proven. And it was said that he is "not required to show the matter of excuse beyond a reasonable doubt; but must offer such testimony as will satisfy the jury that his defense is established. He must prove his case as you would require the proof of any fact about which parties are at issue. Reasonable doubt, in the humanity of our law, is exercised for a prisoner's sake, that he may be acquitted if his case will allow it. It is never applied for his condemnation."

And in Ohio the question was raised and settled in 1843, in Clark v. State. In that case it was determined that the burden was
with the prisoner to show, to the satisfaction of the jury, the perverted condition of his mind. The court declared that it would be unsafe to let loose upon society great offenders upon mere theory, hypothesis, or conjecture. "A rule that would produce such a result would endanger the community, by creating a means of escape from criminal justice, which the artful and experienced would not fail to embrace." It was said not to be sufficient if the proof barely shows that an insane state of mind was possible, or even shows it to have been probable. In 1857 the question was again argued, and the court held that it was sufficient if the prisoner established the fact of insanity by a preponderance of the evidence.28 This has been followed in subsequent cases in the same court, the last having been decided in 1876.29 In that case the court took occasion to say that it considered the question as having been settled by its prior decisions, but that, if the question could be considered as an open one, the majority of the court would be in favor of the rule as already laid down.

In Pennsylvania this subject received very careful attention in Ortwein v. Commonwealth,30 which was decided as recently as 1874, the opinion being delivered by Chief Justice Agnew. "Soundness of mind is the natural and normal condition of men, and is necessarily presumed, not only because the fact is generally so, but because a contrary presumption would be fatal to the interests of society. No one can justly claim irresponsibility for his act contrary to the known nature of the race of which he is one. He must be treated and be adjudged to be a reasonable being, until a fact so abnormal as a want of reason positively appears. * * * * The evidence of insanity must be satisfactory and not merely doubtful, as nothing less than satisfaction can determine a reasonable mind to believe a fact contrary to the course of nature." The court declared that any different conclusion than the one announced would fill the land with acquitted criminals. Since that case was determined, the subject has been brought before the court in four different cases, in 1874, 1876, 1878 and 1879.31 In each of these cases the court affirmed its former ruling, and declared that while the burden was on the prisoner; it was not necessary that proof of his insanity should be absolutely conclusive, but that it might be established by "satisfactory and fairly preponderating evidence.

In Tennessee the burden of proof is on the prisoner, but when the proof of insanity makes an equipoise, the presumption of sanity is neutralized and ceases to weigh, and the jury are in reasonable doubt, and should acquit.32 As to the argument that the safety of society required that a criminal should prove his insanity beyond a reasonable doubt, the court said: "We find the law well-settled, that when the State charges a citizen with crime, his guilt must be established beyond a reasonable doubt. We apply this rule to the worst men about whose sanity no doubt is raised, and turn them loose to repeat their crimes, because they are entitled to the human doctrine of doubts. With what show of reason or humanity could we reverse the rule as to that unfortunate class of citizens whose memory and discretion is found to be of doubtful soundness, and subject them to imprisonment for life?"

So in Texas it was said in 1854: "Insanity is an exception to the general rule; and before any man can claim the benefit of the exception, he must prove that he is within it." 33 In a more recent case, decided in 1880, the Court of Appeals declared that the prisoner's insanity must be made to appear to the satisfaction of the jury trying him.34 Until this is made clearly to appear, he is to be presumed to have a sufficient degree of reason to be responsible for his acts.

In Virginia the Court of Appeals in 1871 considered this whole subject, the matter being elaborately reviewed, and it was decided that the prisoner must prove the fact of his insanity to the satisfaction of the jury.35 The argument of public safety is again advanced. "Insanity is easily feigned," said

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28 Loeffner v. State, 10 Ohio St., 389.
29 Bond v. State, 23 Ohio St. 346; Bergin v. State, 31 Ohio St. 115.
30 78 Pa. St. 423.
33 Carter v. State, 12 Tex. 500.
35 Boswell's Case, 20 Grattan, 860.
the court, "and hard to be disproved, and public safety requires that it should not be established by less than satisfactory evidence. Some of the cases have gone so far as to place the presumption of sanity on the same ground with the presumption of innocence, and to require the same degree of evidence to repel it. But I do not think it is necessary or proper to go to that extent."

II. The second theory is that the burden of proof rests upon the State. It must be conceded that the cases which maintain this theory do so in the face of an overwhelming weight of authority. The courts of Alabama, Arkansas, California, Connecticut, Delaware, Georgia, Iowa, Kentucky, Maine, Massachusetts, Minnesota, Missouri, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, Texas and Virginia, present a most formidable array of authorities against this theory. For while some few of them hold that the prisoner must establish his insanity beyond a doubt, and the others that a preponderance of the evidence is sufficient, they are all agreed that the burden rests with him and not with the State. It will be found, however, that the contrary theory has found favor with some of our ablest and most enlightened courts.

In Illinois, in Fisher's Case,38 decided in 1859, the first of these theories was adopted, and the burden was held to be on the prisoner. But in 1863 this case was overruled and declared to have been decided under peculiar circumstances, not admitting of much deliberation. The presumption of innocence is pronounced to be as strong as the presumption of sanity, and it is said that the jury must acquit if they have a well-founded doubt of the prisoner's sanity. "The human mind revolts at the idea of executing a person whose guilt is not proved, a well-founded doubt of his sanity being entertained by the jury." 37 The matter came up again in 1866, when the court explained the preceding case and declared that it deemed sanity as essential an ingredient in crime as the overt act. "We wish to be understood as saying that the burden of proof is on the prosecution to prove guilt beyond a reasonable doubt, whatever the defense may be. If insanity is relied on, and evidence given tending to establish that unfortunate condition of mind, and a reasonable well founded doubt is thereby raised of the sanity of the accused, every principle of justice and humanity demand that the accused shall have the benefit of the doubt." 38

In Indiana in 1862 it was held to be the duty of the jury to acquit if a reasonable doubt of sanity was entertained.39 In 1869 the question arose again, and a similar ruling was obtained.40 In 1879 the subject was again presented to the attention of the court. It was declared unnecessary that the evidence should preponderate in favor of insanity. A reasonable doubt was sufficient for an acquittal. If the prisoner raises a reasonable doubt as to his sanity, it is necessary that the State should prove mental soundness beyond a reasonable doubt.41

In Kansas the same theory is maintained with ability. In 1873 the Supreme Court of that State declared that the fact of soundness of mind was as much an essential ingredient of the crime of murder as was the fact of killing, or malice, or any other fact or ingredient of murder. "It ought to be made out," said the court, "in the same way, by the same party, and by evidence of the same kind and degree, and as conclusive in its character, as is required in making out any other essential fact, ingredient, or element of murder." 42

In Michigan a similar view is taken of this question, and it is conceded that the judiciary of this State is second to none of our State tribunals. The question was very fully considered in People v. Garbutt,43 the opinion being delivered by Chief Justice Cooley. In speaking of the cases holding the burden of proof to be upon the prisoner, it was said that they "overlook or disregard an important and necessary ingredient in the crime of murder; and they strip the defendant of that presumption of innocence which the humanity of the law casts over him, and which attends him from the initiation of the proceedings until the verdict is rendered." After showing that the crime of murder is only committed when

38 Chase v. People, 40 Ill. 332.
39 Folks v. State, 19 Ind. 170.
40 Stevens v. People, 51 Ind. 485.
41 Guest v. State, 58 Ind. 94.
42 State v. Crawford, 11 Kan. 32.
43 17 Mich. 9.
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a person of sound mind and discretion unlawfully killed another with malice, express or implied, it is declared that the prosecution takes upon itself the burden of establishing not only the killing, but the malicious intent.

"There is no such thing in law as a separation of the ingredients of the offense so as to leave a part to be established by the prosecution, while as to the rest the defendant takes upon himself the burden of proving a negative. The idea that the burden of proof shifts in these cases is unphilosophical, and at war with fundamental principles of criminal law. The presumption of innocence is a shield to the defendant throughout the proceedings, until the verdict of the jury establishes the fact that beyond a reasonable doubt he not only committed the act, but that he did so with malicious intent." 44

In Mississippi this doctrine is also maintained, and with marked ability. The subject was considered in 1879, and it was said: "There can be no crime without mental accountability, and it is just as essential to show the conscious mind as the unlawful act. But it is said that the law presumes sanity. So the law presumes malice from the fact of killing; but if anything in the testimony, either of the State or of the defendant, suggests a reasonable doubt of its existence, nobody ever supposed that the State could stop short of removing this doubt, and of establishing this malice to a moral certainty."

The court declares that it fails to see any consistency or logic in holding that the State must establish all the elements of the crime beyond a reasonable doubt, with the exception of the prisoner's sanity, which may be assumed on less satisfactory proof. "How can a jury say," asks the court: "We have no doubt of the guilt of the prisoner, but do we doubt whether he was sane? If a jury in a capital case should bring in such a verdict, would it not be judicial murder to inflict a sentence of death?" 45

In Nebraska the same question came up in 1876, and a similar conclusion was arrived at. 46

In New Hampshire, also, this view is taken of the question. It was thus settled in 1861, in State v. Bartlett, 47 and the conflict in the adjudged cases was declared to be due to an unjustifiable attempt to apply to criminal causes the rules which govern the trial of issues in civil causes. To shift the burden of proving insanity from the State to the prisoner, is pronounced as being "utterly at war with the humane principle which, in favorum vitae, requires the guilt of a prisoner to be established beyond a reasonable doubt." 48 In 1870 this doctrine was affirmed in State v. Jones. 49

In New York it must be considered as doubtful which of these theories is to be recognized. People v. McCann, 50 has been very generally cited as establishing the principle that the burden of proof rested with the State, but later cases involve the question in great uncertainty.

The rulings which the court will be asked to make in the Guiteau case, as to the burden of proof, and as to the test of responsibility when insanity is interposed as a defense, are awaited with great interest. The questions will no doubt be ably presented to the court, and the admirable bearing of the trial judge, and the impartial manner in which he has held the scales of justice even, give every reason to hope that the very solemn questions involved will not be in any way prejudiced by detestation of the prisoner, nor by outside clamor demanding his execution.

HENRY WADE ROGERS.

Many things connected with Guiteau's wearisome trial astonish, and even shock, an English reader. Not the least strange aspect of it is the latest. Guiteau himself has given evidence in court. His own counsel called him as a witness to prove the defense of insanity. He was questioned by Mr. Scoville as to the chief events of his life from infancy, his connection with the Onedia community, his founding a newspaper, his income, his religious beliefs, his experience as a lecturer, his hunt after a public office, and

44 See People v. Finley, 38 Mich. 482.
45 Cunningham v. State, 56 Miss. 272.
46 Wright v. People, 4 Neb. 498.
47 48 N. H. 224.
48 50 N. H. 309, 400.
49 16 N. Y. 58.

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EVIDENCE BY PRISONERS—GUITEAU'S TRIAL.

Many things connected with Guiteau's wearisome trial astonish, and even shock, an English reader. Not the least strange aspect of it is the latest. Guiteau himself has given evidence in court. His own counsel called him as a witness to prove the defense of insanity. He was questioned by Mr. Scoville as to the chief events of his life from infancy, his connection with the Onedia community, his founding a newspaper, his income, his religious beliefs, his experience as a lecturer, his hunt after a public office, and