

showing beyond a reasonable doubt that there was no productivity between the mental disease and defect and the criminal act.

That is a very difficult thing to show beyond a reasonable doubt, and I think the virtue of the American Law Institute formula is that the defense would be triggered only by the defendant's adducing substantial evidence that he, in fact, was suffering from a mental disease or defect.

The CHAIRMAN. Does counsel have any further questions for Mr. Gasch?

Mr. McIntyre has suggested that I ask you as to whether or not you would favor an affirmative requirement that the defendant prove his insanity by a preponderance of the evidence without shifting the burden back to the Government.

In other words, you put the burden of proving the insanity completely upon the defense.

Mr. GASCH. I will try to find for my friend, your counsel, the transcript of the debate in the American Law Institute on that point.

My recollection is that originally the members seemed to favor making insanity an affirmative defense, which must be proved by a preponderance of the evidence.

The CHAIRMAN. That, of course, would keep the burden on the defendant?

Mr. GASCH. Keep the burden on the defendant.

Then I think it was Learned Hand who stood up, and he was an incomparable fighter, and he felt that the words "substantial evidence" were better than "by a preponderance of the evidence."

And he persuaded the American Law Institute to accept that particular phraseology.

Who am I to disagree with Learned Hand, but you asked my view.

The CHAIRMAN. Surely.

Mr. GASCH. I think that I would prefer that. Perhaps that is the stigma of having been a prosecutor.

Sometimes you cannot get rid of your background and, in this instance, I would prefer that if it were my own personal judgment, but I can well see the basis on which Judge Hands persuaded the American Law Institute to go along with this language.

I think it would be a definite improvement of the situation that we have at this time, and it would definitely clarify what we mean by "some evidence."

Now, before I leave that "some evidence" point——

The CHAIRMAN. Oh, I did not mean to cut you off on that "some evidence" point.

I am happy to have you amplify that in any way you wish.

Mr. GASCH. I have only this to say, sir.

The court of appeals frequently refers to the first *Davis* case, in 160 U.S., because the expression "some evidence" was used there.

I think you have to take into consideration what the Supreme Court was talking about and what the facts of that case were.

There had been a very acrimonious dispute between two farmers, and one of them was back in his cotton patch, picking cotton, and doing nothing to disturb the other fellow, but Davis got his gun and went to his neighbor's cotton patch and shot and killed him.

That is the kind of thing they were dealing with in that case.