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Evidence--Burden of Persuasion

John W. Murphy Jr.
University of Kentucky

right existing in the minor alone,[23] nor can they compromise or settle any right of the minor in their capacity as parents. This is for the statutory guardian alone.

Although this note is for the purpose of outlining the prescribed procedure in Kentucky for the compromise and settlement of minors' tort claims and not to approve or disapprove it as such, nevertheless in conclusion, it is urged that since the statutory guardian is the only person who can legally compromise or settle the minors' claims this procedure should be followed, if at all possible, in order to give the proper protection to all concerned.

JAMES T. YOUNGBLOOD

[23] Meyer's Admr., & C. v. Zoll, 119, Ky. 480, 84 S.W. 543 (1905).

EVIDENCE—BURDEN OF PERSUASION

In the early days of trial by jury when the law was an amoeba, instructions were not needed to assist the jury in reaching the result required by the applicable legal theory. As the law progressed, it became evident that the jurors were not equipped to understand and apply the law. Consequently, it became the duty of the trial court to give an exposition of the principles of law appropriate to the case, restricted to the matters in issue in such a manner as to be readily understood by the mind untrained in the law. It has been said that although our legal system requires that instructions be made intelligible to a jury, it is not essential that they be useful to the jury.[1] A cursory examination of the instructions submitted to the jury in any civil case will reveal the shameful truthfulness of that writer's opinion.

In a sound legal system there must exist some test of ascertaining whether a fact exists or does not exist. Some measure or amount of persuasion must be required. Some degrees of belief must be reached by those whose duty it is to find the facts. The purpose of this note is to present and critically evaluate the tests expounded by the courts to inform the jurors in civil cases as to how they shall determine whether the proponent has sufficiently satisfied the burden of persuasion. No attempt will be made to analyze the method employed in each jurisdiction. This note will be confined to the three formulas most frequently used to determine whether the party who has the *onus probandi* has convinced the jury that his fact propositions are true.

[1] See note, 42 YALE L. J. 194, 208 (1932).

Preponderance of the Evidence

The weight of authority seems to be that in most civil actions the jury must believe from a "preponderance of the evidence" that the facts set forth by the proponent are true before they may return a verdict for him.[2] In order to understand this rule it is necessary to recall certain fundamental propositions with regard to burden of proof. Normally the plaintiff is said to have the ultimate burden of proof, and the defendant has the burden of proving any affirmative defense. Another way of saying it is that a party has the burden of proof as to any issue introduced by him. Except for certain departures based on policy considerations, such as the burden of proof as to payment as a defense being on the defendant, and, perhaps, res ipsa loquitur in certain jurisdictions, the above principles are universally accepted. The one who has the burden of proof has the risk of jury persuasion, so that if the evidence is equally balanced as to any issue, the party who has the burden loses. Thus it becomes necessary to establish some standard or test to determine the quantum of proof necessary to satisfy the burden. The preponderance of the evidence test contemplates that there must be appreciably more evidence in favor of a proposition than against it before the jury can accept it as true. The test is said to be qualitative rather than quantitative, since the jury is permitted to evaluate credibility, and may therefore give greater weight to the testimony of a single witness on one side than to that of several on the other. Perusal of any great number of cases on the subject leads one inescapably to the conclusion that something less than belief is required, and that any substantial excess of value of the evidence on one side rather than the other will support the burden. The jury is thus required to find only a greater probability of truth on the one side. It is not required to be convinced or to believe, which is the requirement in fraud cases. The difficulty with this conecpt is in conveying it accurately to the minds of the jury.

The reason for the preponderance of the evidence test has been said to be that where a loss must fall upon one of two persons, it should fall upon the one who is shown by proof establishing the reasonable probability of the fact to have been the cause of the loss.[3] The jury by such an instruction is not informed of the amount of belief which they should have in order to find for the party upon whom has

[2] 9 WIGMORE, EVIDENCE sec. 2498 (3rd ed. 1940); 1 BLASHFIELDS INSTRUCTIONS TO JURIES 618 (2d ed. 1916); 20 *Am. Jur.* 1099 (1939); 32 C. J. S. 1046 (1942).

[3] Mutual Life Insurance Co. v. Springer, 193 Ark. 990, 104 S.W. 2d 195 (1937); Newman v. Great Shoshone & T. F. Water Power Co., 28 Idaho 764, 156 P. 111 (1916); Cincinnati Butchers Supply Co. v. Conoly, 204 N. C. 677, 169 S.E. 415 (1933).

been placed the burden of persuading them of the truth of the facts which he has alleged. The instruction standing alone does not appear to furnish the jury with a satisfactory formula since many of them may not know just what a preponderance amounts to and it is doubted if any of them will know what elements to consider in determing whether or not either party has a preponderance of the evidence. This instruction emphasizes the weight of evidence necessary and does not direct the attention of the jury to the degree of belief which the proponent must produce in their minds before he is entitled to a favorable finding.

Although the decisions are not in harmony, the majority rule seems to be that it is the better practice for the court not to attempt to define the term. In some jurisdictions it has been held proper to use the term "preponderance" without defining it because it is a term that is generally so well understood that to define it would be a reflection upon the intelligence of the jurors, and that a definition not confined to an absolutely accurate statement of the ordinary meaning of the term would lead to utter confusion.[4] The definitions given this term when it has been defined are numerous and varied. Some of these are "greater and superior evidence",[5] "more credible or probable evidence",[6] "best evidence",[7] and "more convincing or satisfactory evidence".[8] A Georgia statute defines preponderance of evidence as "that superior weight of evidence upon the issues involved, which, while not enough to wholly free the mind from a reasonable doubt, is yet sufficient to incline a reasonable and impartial mind to one side of the issue rather than to the other."[9] Many other definitions in varying and ambiguous form convey the same or similar notions, and each court has its store of cases serving as precedents for its own particular

[4] Keschman v. Scott, 166 Mo. 214, 65 S.W. 1031 (1901); Martin v. St. Louis S. W. R. Co., 56 S.W. 1011 (Tex. Civ. App. 1900).

[5] Barnes v. Phillips, 184 Ind. 415, 111 N.E. 419 (1916); Palmer v. Huston, 67 Wash. 210, 121 P. 452 (1912).

[6] United States v. Southern Pacific Co., 157 F. 459 (1907).

[7] Johnstone v. Seattle R. S. Ry., 45 Wash. 154, 87 P. 1125 (1906). But see Peart v. Perry, 152 Wash. 5, 277 P. 81 (1929).

[8] Thurman v. Miller, 50 Ind. App. 372, 98 N.E. 379 (1912); Browning v. Bailey, 216 Mo. App. 122, 261 S.W. 350 (1924).

[9] I GA. CODE sec. 38.106 (1933). Another statute lists the factors that may be used by the jury in determining which party has the preponderance of the evidence. "In determining where the preponderance of the evidence lies, the witnesses' manner of testifying, their intelligence, their means and opportunity for knowing the facts to which they testified, the nature of the facts to which they testified and the probability or improbability of their testimony, their interest or want of interest, and also their personal credibility as far as the same may legitimately appear from the trial. The jury may also consider the number of the witnesses, though the preponderance is not necessarily with the greater number." GA. CODE sec. 38.107 (1933).

forms of instructions.[10] Nothing is to be gained by a detailed discussion of these cases. The law will be relieved of much confusion when these definitions no longer have current significance but become only legal history. When anything more than a simple caution and brief definition is given, the matter tends to become one of mere words and the jury, is rather likely to be confused or at least continue in a state of incomprehension. Most attempts to explain the meaning of this phrase consist of expressions that need explanation as much as the term sought to be explained. To refrain from such attempts would be better since the meaning of the term will not be made more clear by a multiplication of words. The truth is that there is no measure of the weight of evidence other than the feeling of probabilities which it engenders.

A few courts have attempted to enumerate the elements which the jury may consider in determining the preponderance of evidence,[11] including such factors as the character of the witness, his intelligence, his reputation for truthfulness, his demeanor on the witness stand, the number of witnesses, their means of knowledge and their interest, if any, in the outcome of the suit. This practice while not advisable as a method of defining the term "preponderance" or explaining its meaning would be of great help in framing a test for the jury, without including the nebulous word itself. However, great care should be exercised by instructing the jury that enumeration is merely suggestive and that they are free to consider any other elements, evidence, facts or circumstances in determining where the greater weight of the evidence lies.

Clear and Convincing Proof

In other groups of cases, the courts have held that certain issues must be proved by something more than a preponderance of the evidence, e.g., by "clear and convincing proof" or by a similar test.[12] Many phrases and formulas have been coined to express this amount of persuasion, e.g., "clear, cogent and convincing", "clear and satisfactory", "definite, clear, and convincing", "clear and irresistible", "clear, precise and indubitable", etc. This stronger degree of proof has been required in cases concerning fraud, undue influence, reformation of a

[10] See annotation, 93 A.L.R. 155 (1934).

[11] L. & N. Ry. v. Ward, 61 F. 927 (C.C.A. 7th 1894); Montgomery v. Seaboard Air Line Ry., 73 S. C. 503, 53 S.E. 987 (1906). But see: Parker v. Chicago Ry., 200 Ill. App. 9 (1916).

[12] Jones v. Coleman, 188 N.C. 631, 125 S.E. 406 (1924); Massie v. Hutcherson, 296 S.W. 939 (Tex. Civ. App. 1927); and see Reiss v. Utter, 173 Wis. 180, 180 N.W. 810 (1921).

writing, mistake, oral agreements to bequeath by will and other similar cases.[13] The reason for such a rule has been said to be that in such cases a court of equity is exercising one of its highest and most delicate functions and it should not undertake so important a duty unless the evidence is of the most persuasive character.[14] The rule means nothing more than that the entire proof together with the surrounding circumstances shall be such as to convince a reasonable prudent man of the truth of the facts alleged and to dispel any substantial doubt upon the matter.

There should be a clear understanding and definition of what is meant by "clear and convincing proof". This instruction speaks of and emphasizes the weight of the evidence and does not as it should do, direct the attention of the jury to the degree of belief which must be produced in their minds before they are entitled to find in favor of the party introducing the fact. The degree of belief which should exist before it may be concluded that the asserted fact is true is the element which should be emphasized and made plain. If a trial judge tells the jury that the burden is upon a party to prove a specified fact by clear and convincing proof, he should explain that this means only that they must find that the fact does not exist unless the evidence is of such a degree as would convince a reasonable man of its truthfulness. He should confine his instruction to a definition of the issues and a direction that they are not to consider any part proved unless there is clear and convincing evidence that would satisfy a reasonable man. His instruction might well contain a warning that the probability of its existence need not be so great as to dissipate all reasonable doubt. It seems rather clear that the rhetorical and flowery language employed in instructions should be eliminated. Words with doubtful or obscure meanings should be avoided and plain words and phrases substituted to define the degree of belief which must exist, words and phrases which do not suggest a test of a nebulous or mysterious nature should be excluded. Choice collections of glamorous generalities and aphorisms even though they bear the distinguished imprimatur of a learned justice of our highest courts should never be used to aid the jury in reaching their verdict. However helpful they may be in supplying phrases to express a result, they will be found of no value as guides to a goal. They do not lighten the task of fixing the precise

[13] 9 WIGMORE, EVIDENCE, sec. 2498 (3rd ed. 1940); 32 C. J. S. sec. 1023 (1942); see Note, 32 CALIF. L. REV. 74 (1944).

[14] Atha v. Webster, 181 Ky. 581, 205 S.W. 598 (1918); Whitt v. Whitt, 145 Ky. 367, 140 S.W. 570 (1911). It was suggested at an early date that this "clear and convincing proof" test is applicable only in equity actions and that in jury trials, the rule is that the issue must be determined by a preponderance of the evidence. Holt v. Brown, 63 Iowa 319, 19 N.W. 235 (1884).

meaning of the ambiguous language used in the instructions nor will they after such meaning has been determined, disclose a process of solving the pertinent problem.

Proof Beyond a Reasonable Doubt

Statements that proof must be beyond a reasonable doubt have been made by some courts in reference to purely civil actions where no crime is charged.[15] This view is so rare that it is not believed to be of sufficient import to warrant any extended discussion. Where a crime is imputed in a civil action, the question as to the amount of proof necessary to establish the existence of the crime is a matter upon which there has been some diversity of opinion among text writers and judges. But there is now no doubt that the general rule supported by the majority of jurisdictions is that in civil cases, it is sufficient to establish the existence of a criminal act by such evidence as would suffice to prove any other fact involved in a civil controversy, usually held to be a preponderance of the evidence.[16] It is not required to be proved "beyond a reasonable doubt" as in criminal prosecutions, although one state holds that a criminal act which is directly in issue in a civil proceeding must be established beyond a reasonable doubt.[17]

Should the test be the same in cases where the defendant is charged with a crime in a civil suit and where he is merely charged with a civil wrong? It is believed not. Every man charged with a crime is entitled to the presumption of innocence and the party who brings the charges should be bound to overcome that presumption by evidence. It does not follow that a party who is charged in a civil case with crime or moral dereliction may not have the benefit of good character and the presumptions of law in favor of innocence. Presumptions, like probabilities, are of different degrees of strength. To overcome a strong presumption requires more evidence than to overcome a weaker one. To fasten upon a person a very heinous or repulsive act should require stronger proof than to charge him with an indifferent act. What could be more damaging to reputation than a charge of unchastity, illegitimacy, criminal conversation, use of intoxicating liquors to excess and the like. To charge a man with willfully and maliciously setting fire to his own house in order to collect the insurance should

[15] Lord v. Reed, 254 Ill. 350, 98 N.E. 553 (1912); Frayler v. United Cork Co., 14 N. J. Misc. 91, 182 A. 273 (1935); Dickenson County Bank v. Royal Exchange Assurance of London, Eng., 157 Va. 94, 160 S.E. 13 (1931).

[16] See Ann. 62 A. L. R. 1449 (1929). A very excellent note with an appendix setting forth the rule in each state appears in 13 MINN. L. REV. 556 (1929).

[17] McInturff v. Insurance Co. of N. A., 248 Ill. 92, 93 N.E. 369 (1910); Germania Fire Ins. Co. v. Kleiner, 129 Ill. 599 (1889); see notes, 1 U. OF CHI. L. REV. 772 (1934); 12 MINN. L. REV. 660 (1928).

certainly require more evidence than to establish the fact of non-payment of a note. The social stigma cast upon one charged with a crime even in a civil proceeding is far greater than that attached by a civil suit alone. As a noted authority has said:

> The right which every man has to his character, the value of that character to himself and his family, and the evil consequences that would result to society if charges of guilt were lightly entertained, or readily established in courts of justice . . . have lead to the adoption of the rule that all imputations of crime must be strictly proved.[18]

The greater the offense, the greater proof to establish such offense should be required.

From an early date in Kentucky, it has been held to be error in an ordinary civil case to instruct the jury that they must believe from a "preponderance of the evidence" before they can return a verdict for either party.[19] The reason given for this rule is that:

> . . . where a trial court undertakes to place the right of recovery upon the preponderance of testimony in favor of the plaintiffs or those holding the affirmative of the issue, it often becomes necessary to explain what is meant by the preponderance of proof, and in doing so a jury is often misled by the trial court. . . . The word preponderance should be omitted from such instructions, as it is only calculated to embarass the jury when considering the issue.[20]

An instruction in Kentucky in an ordinary civil action should contain the requirement that the jury "believe from the evidence" the facts submitted for determination before they can return a verdict accordingly.[21] The jury must be governed in its findings, not by what it believes, but by *what it believes from the evidence.* Sufficiency of the evidence is not to be determined by the number of witnesses since the jury has the right to give credence to the testimony of one witness over that of all others.[22] The use of this type of instruction makes it unnecessary for the court to resort to the employment of long and involved phrases and sentences in order to explain its meaning to a jury.[23] But a closer examination reveals that the rule requires the pro-

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[18] 13 MINN. L. REV. 556, 560 (1929).

[19] Wall v. Hill's Heirs, 40 Ky. (1 T. B. Mon.) 290 (1841).

[20] Ragsdale v. Ezell, 99 Ky. 236, 238, 35 S.W. 629, 630 (1896).

[21] Roman v. McGinnis, 156 Ky. 205, 160 S.W. 928 (1913). In a number of Alabama cases, it has been held that an instruction which uses the phrase "if you believe" instead of the appropriate phrase "reasonable satisfaction" is faulty, improper, objectionable, or bad in form and that the trial court does not commit error in refusing the instruction. Goodwyn v. Gibson, 235 Ala. 19, 177 So. 140 (1937); Pittman v. Calhoun, 231 Ala. 460, 165 So. 391 (1936).

[22] Vale v. Illinois Pipe Line Co., 281 Ky. 1, 134 S.W. 2d 940 (1939); Smith v. Ferguson, 256 Ky. 545, 76 S.W. 2d 606 (1934); L. & N. R.R. v. Curtis' Adm'r., 233 Ky. 276, 25 S.W. 2d 398 (1929).

[23] But this degree has been held to apply only to ordinary civil actions, a greater degree being required in cases to invalidate or modify a written contract by parol evidence, to establish an omission or mistake in a deed, to prove fraud

ponent to meet a heavier burden than is required in other jurisdictions. How can a juror really believe from the evidence that a certain alleged fact is true if he has not been clearly and satisfactorily convinced in his own judgment of the existence of that fact? Must he not be convinced of the truth of that alleged fact before he believes it? To convince is to lead one to believe. Indeed it may be argued that if a juror believes that a certain fact is true, he cannot do more than believe the truth of the alleged proposition and he cannot believe evidence which is not convincing. Thus, the actual effect of the Kentucky rule appears to require the same degree of belief that is required in those cases where fraud, mistake, or undue influence is alleged. It is believed that this places too great a burden of persuasion on the proponent in that it requires the jury to entertain a stronger degree of belief than is required in any other jurisdiction. Such a rule is too harsh and should be modified to conform with the line of authority.

Instructions on burden of persuasion should not state too many technical rules and if an attempt is made to go into degrees of proof, it is almost certain to get the matter so complicated that a jury of laymen will have no idea as to what is meant.[24] A short simple instruction informing the jury that the evidence relied upon by them in finding for the one party must be more convincing to them and more worthy of belief than that which is offered in opposition is all that is necessary. A plain declaration to that effect will be understood by a jury and should be sufficient to inform them just what is required. The more the instruction is elaborated upon the more complex it becomes and the more likely it is to be misunderstood. There is no need for the court to bother about the "preponderance of the evidence" or "clear

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or mistake in a written contract, and other cases where fraud, mistake or undue influence is alleged. The proof required in such cases is that it must be clear and convincing. Fordson Coal Co. v. Garrard, 277 Ky. 218, 125 S.W. 2d 977 (1939); Dehlinger v. Grave, 238 Ky. 461, 38 S.W. 2d 246 (1931); Turner Elkhorn Coal Co. v. Smith, 218 Ky. 503, 291 S.W. 715 (1927); Goode v. Gover's Ex'r., 212 Ky. 418, 279 S.W. 639 (1926); Farmers Bank & Trust Co., v. Dent, 206 Ky. 405, 267 S.W. 202 (1924). One reason given for this heavier degree of proof is that the court is exercising one of its highest and most delicate functions and will not undertake so important a duty unless the evidence be of the most persuasive character. Whitt v. Whitt, 145 Ky. 367, 140 S.W. 570 (1911).

[24] See 11 U. OF CIN. L. REV. 119, 191-195 (1937). Judge W. B. Wanamaker speaking upon the subject of "Instructing the Jury" said that he had prepared and mailed a questionaire to 2,250 former jurors in Summit County, Ohio. Replies were received from 843 of the jurors. One question asked was, "What proposition of law was most difficult to understand?" Highest on the list was preponderance of evidence. 232 jurors found this instruction the most difficult to understand. Proximate cause was next with a count of 203. Reasonable doubt was third highest with a poll of 136. It has been suggested that trial judges be required to conduct a school of preliminary instructions for jurors before the commencement of their service, particularly with reference to such general propositions as preponderance of the evidence, negligence, and proximate cause. 11 U. OF CIN. L. REV. 247, 255 (1937).

and convincing proof" or to go to the trouble of explaining their meaning. It has been suggested that a charge which would require the jury in all cases to find the truth of the proposition to be proved would be accurate, realistic and easily understood if the proposition to be proved were put in terms of preponderance of probability: in the ordinary civil case, that the existence of the fact in dispute is more probable than its non-existence; in the unusual civil case, that its existence is *much* more probable than its non-existence; and in a criminal case, that its existence is so highly probable as to banish all reasonable doubts.[25] It may be doubted if even the trained legal mind has such nicely adjusted scales as to determine to a hair on which side the evidence preponderates.[26] But even the lay mind can know when it believes that a certain alleged fact is probably true. The truth is that these high sounding "preponderances" and "clear and convincing proof" are mere pharisaical conundrums, invented to explain otherwise incomprehensible formulas and have no support in the established facts and policies of our law. As one noted authority has described them: "a wondrous cobweb of pedantry is here woven to occupy the jury's simple mind and the trial Judge's tongue."[27]

We should not have uncertainty, conflict and confusion in our legal system as to what the degrees of persuasion and belief are or as to how they should be adequately expressed in instructions to the jury since it is a problem that affects all lawsuits. This problem should be so thoroughly explored and so definitely settled that it no longer causes trouble for either the trial or appellate court. It is not too much to hope that a proper test can be formulated which will do much to prevent such confusion. Surely there is much greater chance to prevent

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[25] See 47 HARV. L. REV. 59, 66-67 (1933); 25 ROCKY MT. L. REV. 34, 39 (1952). For proposed statutes defining the presently employed terms upon such a basis, see 32 CALIF. L. REV. 242, 260-268 (1944).

[26] One judge represented himself to be very adept at such a task however, by stating, ". . . a bare preponderance is sufficient, though the scales drop but a feather's weight in his favor." Leggett v. Ill. Central R. Co., 72 Ill. App. 577, 579 (1897). Another legal writer has absurdly stated that a preponderance of the evidence consists of 51% of the quantum of evidence introduced by both parties, while clear and convincing amounts to 70% and beyond a reasonable doubt consists of 90%. 54 DICK. L. REV. 461-462 (1950). This writer however fails to reveal his method of such mathematical conclusion.

[27] 9 WIGMORE, EVIDENCE sec. 2498, 326, n. 1 (3rd ed. 1940). For the opinion of an experienced juror on this problem see SUTLIFFE, IMPRESSIONS OF AN AVERAGE JURYMAN 40 (1931). He says, "Many jurors have about as adequate an idea of 'preponderance of evidence' and 'reasonable doubt' as a small boy has of moral turpitude. All of the judges . . . instruct juries as to these two vital points, but many of the definitions are only language. . . . Why would it not be a good idea to have definitions of 'preponderance of evidence' and 'reasonable doubt' given in *standard* language, selected by a committee of able lawyers and written to be digested by the average business man? After a while, at least, jurymen would have an understanding of them, like the prayers in a prayer book."

it if a clear guide is furnished the trier of facts than if an unintelligible and confusing guide is given to them.

Therefore, the following suggestive basic instructions are submitted to serve as a means of informing the jury in plain terms as to what is expected and required of them.

Ordinary civil case—"The court instructs the jury that if you believe that the evidence shows a greater probability of truth than of falsity you must find for the offeror."

Unusual Civil Case—"The court instructs the jury that if you believe that the evidence shows so much greater probability of truth than of falsity that a reasonable man would be convinced of its truth you must find for the offeror."

Criminal cases—"The court instructs the jury that if you believe that the evidence is so convincing that a reasonable man would not doubt it you must find for the offeror."

These instructions can be easily adapted to fit the facts of each particular case and thus inform the jury in plain terms as to the degree of belief without the use of rhetorical and flowery language. It is believed that such instructions if used would eliminate much of the confusion that exists in the jurors minds after listening to the instructions given them.

JOHN W. MURPHY, JR.

ADOPTION—REQUIREMENT OF CONSENT OF NATURAL PARENT

The typical attitude of courts today with regard to the necessity for parental consent to the adoption of a child and the importance attached to such consent is illustrated by the recent Arkansas case of *Woodson* v. *Lee*.[1] In construing the Arkansas statute,[2] which requires child for six months next preceding the filing of the petition for adoption, the court held that the evidence failed to disclose such an abandonment by the father as to preclude the need for his consent. Previously a divorce decree had given the mother custody and responsibility for the maintenance and upkeep of the child during minority with rights of visitation given to the father. The father had written consent of living parents unless the parent has abandoned the visited his son every two weeks until sometime before the petition for

[1] 254 S.W. 2d 326 (Ark. 1953).
[2] ARK. STATS. sec. 56-106 (a), (b) (I) (1947).